

United States

Circuit Court of Appeals

For the Ninth Circuit.

VR
2248

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Appellant,
vs.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Appellee.
and

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Appellant,
vs.

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the
United States for the District of Montana.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

E. J. McCABE,
Great Falls, Montana.
Attorney for Plaintiffs.

TOOLE & BOONE,
Missoula, Montana.
Attorneys for Defendants. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the District of Montana.

Great Falls Division.

No. 69.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Defendant.

and

No. 70.

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Defendant.

Be it remembered that on July 20, 1939, a Trans-
cript on Removal from the District Court of the
Eighth Judicial District of the State of Montana,
in and for the County of Cascade, was duly filed
in each of the above entitled causes, said transcripts
on removal each consisting of the following papers,
towit:

Complaint,

Petition for Removal,

Notice of Petition and Bond for Removal,
Bond on Removal,
Order for removal,
Clerk's Certificate to Transcript on Removal,
and being in the words and figures following, to-wit:
[2]

In the District Court of the Eighth Judicial District
of the State of Montana, in and for the County
of Cascade

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

v.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Defendant.

COMPLAINT

The plaintiff for her cause of action against the
defendant complains and alleges:

I.

The plaintiff is informed and believes and there-
fore alleges that at all times hereinafter mentioned
the defendant, United States Fidelity and Guar-
anty Company, was and still is a corporation cre-
ated, organized and existing under and by virtue of
the laws of the State of Maryland and authorized
to do and doing business within the State of Mon-
tana.

II.

That on or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clerk, appointed Administratrix of the Estate of Roberta Doheny, Deceased, by an order of said court, duly given, made and entered on said date in the matter of the Estate of Roberta Doheny, Deceased, and thereafter letters of administration in the Estate of Roberta Doheny, Deceased, were duly issued to plaintiff under the seal of said court and the hand of the Clerk of said court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Roberta Doheny, Deceased. [3]

III.

That on or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the payment to said co-partners by the State of

Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars (\$15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of \$15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all respects of the provisions of said contract by the said co-partners and recited the sum of \$15,615.66 as the penalty thereof.

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least \$10,000.00 for one person and a [4] total of \$20,000.00

for one accident and promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of \$10,000.00 for one person and \$20,000.00 for one accident. That plaintiff has heretofore demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty Company, and said co-partners and said defendant have failed and refused to furnish either thereof and that plaintiff is informed and believes and therefore alleges that under the provisions of said insurance policy and in accordance with the provisions of the agreement between the said co-partners and the State of Montana the defendant corporation promised and agreed to pay all claims from liability imposed upon the aforesaid co-partners by law for damages on account of bodily injuries including death at any time resulting therefrom sustained by any of the public by reason of the carrying on of the work mentioned and described in the contract between said co-partners and the State of Montana in connection with the public Highway mentioned in said contract, and

expressly provided in said policy that any person of the public sustaining injuries and damages as aforesaid or his or her personal representative was authorized to institute and maintain an action against the defendant corporation for the amount of any judgment obtained in an action theretofore brought against the said co-partners for such damages and injuries in case execution on said judgment against the said co-partners be returned unsatisfied.

V.

That thereafter and on or about the 12th day of December, 1934, and while carrying on the work mentioned and described in the [5] written agreement between the co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny and that at the time the said Roberta Doheny was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District in the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of \$5,116.89 was

duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore been made by plaintiff.

VI.

That thereafter the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest thereon has been paid and that plaintiff still is the owner and holder of said judgment.

VII.

That thereafter on or about the 17th day of August, 1937, an execution was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring [6] the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District

Court of Cascade County, on or about the 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

That the said co-partners had fully complied with all the requirements and conditions precedent enumerated in the aforesaid policy and that plaintiff has complied with all the requirements and conditions precedent and is entitled to maintain this action against the defendant, United States Fidelity and Guaranty Company, to recover the sum of \$5,116.89 and accrued and accruing interest thereon from May 4, 1936, and became so entitled to maintain said action on or about the 10th day of September, 1937, upon the return of the execution not satisfied and by virtue of the judgment rendered and against the said co-partners and finally determined by the aforesaid Supreme Court on appeal on or about the 5th day of June, 1937.

IX.

That plaintiff is informed and believes and therefore alleges that the defendant, United States Fidelity and Guaranty Company retained attorneys and paid the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid and that said defendant retained the attorneys and paid for their services rendered and paid the expenses

connected with the appeal of the aforesaid action to the Supreme Court of the State of Montana from the judgment given, made and entered by the aforesaid District Court in said action.

X.

That heretofore on or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is hereto annexed marked "Exhibit A" and by this reference [7] made a part hereof. That said defendant has failed to make payment of said judgment either in whole or in part.

Wherefore, Plaintiff prays judgment against the defendant for the sum of \$5,116.89 and interest thereon at the rate of Six Per Cent (6%) per annum from May 4, 1936, and costs of this action and for such other and further relief as may be equitable, just and proper.

E. J. McCABE,

Attorney for Plaintiff

State of Montana

County of Cascade—ss.

E. J. McCabe being first duly sworn deposes and says:

That he is the attorney for plaintiff named in the foregoing complaint, and makes this verification for the reason that plaintiff is absent from Cascade County, Montana, wherein affiant resides and maintains his office and where this verification is made;

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of this affiant.

E. J. McCABE

Subscribed and sworn to before me this 24th day of April, 1939.

(Notarial Seal) KATHLEEN SMESTAD
Notary Public for the State of Montana. Residing
at Great Falls, Montana

My commission expires Mar. 31, 1942. [8]

“EXHIBIT A”

Great Falls, Montana

May 13, 1938

United States Fidelity and Guaranty Company
Baltimore, Maryland

Gentlemen:

On or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, co-partners doing business under the name of Coverdale and Johnson, entered into a written contract with the State Highway Commission of the State of Montana for the performance of certain work and the furnishing of certain materials constituting improvements on a public highway known as the “Augusta-Sun River Road” in Lewis and Clark County, Montana. At the time of the making of said contract the said John M. Coverdale and E. O. Johnson, co-partners as aforesaid, as Principal and your Company as Surety executed and delivered a

certain contract bond in writing in the principal sum of \$15,615.66, the condition of which bond was that the aforesaid co-partners would in all respects faithfully perform all of the provisions of the aforesaid contract between said co-partners and the State of Montana acting by and through the State Highway Commission.

The aforesaid Highway Contract contained the following provision:

“The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least \$10,000.00 for one person and a total of \$20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance.”

Thereafter your Company notified the State Highway Commission of Montana by written communication that you had written a public liability policy of insurance in accordance with the terms and provisions of aforesaid contract to and with the aforesaid co-partners in the amount of \$10,000.00 for one person and a total of \$20,000.00 for one accident. Thereafter, one Roberta Doheny was killed as a result of the grossly negligent and reckless operation of an instrumentality being used by said co-partners at the time in carrying on the prosecution of the work under aforesaid Highway con-

tract. An action was thereafter instituted in the District Court of the 8th Judicial District of the State of Montana in and for the County of Cascade by the undersigned, Ethel M. Doheny, as Administratrix of the estate of Roberta Doheny, deceased, to recover from said co-partners damages by reason of the injuries and death of aforesaid Roberta Doheny by reason of the alleged grossly negligent and reckless operation of aforesaid instrumentality while carrying on the prosecution of work under the aforesaid Highway contract, in which action a judgment was duly given, made and entered by said Court on the verdict on the 4th day of May, 1936, of the jury empanelled to try said action against the said co-partners, as defendants, for the sum of \$5000.00 together with the additional sum of \$116.89 costs together with interest thereon at the rate of 6% per annum, and which action was defended at your direction by Attorneys employed by your Company and to whom you paid an Attorney's fee for their services rendered in said action.

[9]

An appeal was taken to the Supreme Court of Montana from the judgment in said action by aforesaid Attorneys at your suggestion and the services of said Attorneys rendered on said appeal were paid by your Company. Thereafter, the judgment of the lower Court was duly affirmed by the Supreme Court. Said judgment has not been paid nor any part thereof and the undersigned as Administratrix

aforesaid still is the owner and holder of said judgment.

At the direction of the undersigned, E. J. McCabe, her Attorney, made oral demand for payment of the aforesaid Judgment upon Don Jacobus, your agent at Helena, Montana, and was informed by said agent that your Company claimed non-liability for payment of said judgment and refused payment thereof.

An execution on aforesaid judgment has been heretofore duly issued and delivered to the Sheriff for levy and enforcement of said judgment against property of aforesaid co-partners and the said execution has been returned unsatisfied either in part or in whole by reason of inability to locate any property of aforesaid co-partners.

At the direction of the undersigned, her aforesaid Attorney has conducted an investigation for the purpose of finding any property of aforesaid co-partners available for execution and no property of any kind has been located.

Demand is hereby made that you pay the undersigned, as Administratrix, aforesaid, the aforesaid judgment in the sum of \$5,116.89 with interest from May 4th, 1936 at the rate of 6% per annum, and in the event of your failure to comply with this demand, notice is hereby given that the undersigned will institute suit to enforce payment of said judgment.

A copy of the within demand is being delivered to your agent at Helena, Montana.

Very truly yours,
ETHEL M. DOHENY,
414 Strain Building
Great Falls, Montana

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk. [10]

In the District Court of the Eighth Judicial District
of the State of Montana, in and for the County
of Cascade.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Defendant.

PETITION FOR REMOVAL

Comes now United States Fidelity and Guaranty Company, a corporation, the defendant named in the above entitled action and makes and presents this its petition for removal of the above entitled action to the District Court of the United States for the District of Montana, and respectfully shows and alleges:

I.

That the above entitled action is an action in which there is a controversy which is wholly between citizens of different states. That the plaintiff in said action was, at the occurrences relied upon in the complaint, and at the time of the commencement of this action, and still is a resident and citizen of the State of Montana.

II.

That the defendant, United States Fidelity and Guaranty Company is now, and at all of the times mentioned in plaintiff's complaint has been, and was at the time of the commencement of the above entitled action, a corporation duly [11] organized and existing under and by virtue of the laws of the State of Maryland, licensed to do business in Montana, and a citizen and resident of the State of Maryland, and a non-resident of the State of Montana.

III.

That on or about the 2nd day of June, 1939, the plaintiff herein filed the above entitled action against the above named defendant in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, said action being Cause No. 28770 in said court and district. That in the above entitled action the plaintiff seeks to recover from the defendant United States Fidelity and Guaranty Company, a corporation, the sum of Five Thousand One Hundred six-

teen and 89/100 Dollars (\$5116.89) which amount allegedly represents the amount of a certain judgment given, made and entered by the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in favor of the above named plaintiff in an action by the above named plaintiff against John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson.

That in the above entitled action the plaintiff seeks to recover the amount of said judgment, to-wit, the sum of Five Thousand One Hundred sixteen and 89/100 Dollars (\$5116.89), together with interest, from the defendant United States Fidelity and Guaranty Company on the ground that said defendant had issued to the said John M. Coverdale and E. O. Johnson as said co-partners, doing business under the firm name of Coverdale & Johnson, a contractors' public liability insurance policy with a liability of \$10,000.00 for one [12] person and a total of \$20,000.00 for one accident and plaintiff further alleges that by reason of the issuance of said policy of insurance the said defendant United States Fidelity and Guaranty Company is legally bound and obligated to pay the said judgment in the amount of Five Thousand One Hundred sixteen and 89/100 Dollars (\$5116.89), together with interest from and after May 4, 1936.

That the matter and amount in dispute and controversy in said suit exceeds, exclusive of interest and costs, a sum or value of Three Thousand and

no/100 Dollars (\$3000.00), all of which will more fully appear from the complaint in said action, which is hereby referred to and made a part hereof.

IV.

That the defendant makes and files herewith a bond in the sum of Three Hundred and no/100 Dollars (\$300.00), with good and sufficient surety for their entering in the District Court of the United States for the District of Montana, within thirty days from the date of filing this petition a certified copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States, if it shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore, this petitioner prays this court to proceed no further herein except to accept this petition and said bond and to make an order requiring said defendant to enter and file a certified copy of the record herein in the said District Court of the United States for the District of [13] Montana, within thirty days from the filing of this petition, as provided by law.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant. [14]

State of Montana

County of Lewis and Clark—ss.

Don W. Jacobus, being first duly sworn upon his oath, deposes and says: That he is the Manager for the defendant, United States Fidelity and Guaranty

Company, a corporation, and that he makes this verification as such manager for and on behalf of said defendant and that he is duly authorized to make the same; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true.

DON W. JACOBUS

Subscribed and sworn to before me this 19th day of June, 1939.

(Seal) W. T. BOONE

Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires Aug. 2, 1941.

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [15]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Defendant.

NOTICE OF PETITION AND BOND FOR REMOVAL

To Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, the above named plaintiff:

To E. J. McCabe, plaintiff's attorney:

You and each of you are hereby notified that United States Fidelity and Guaranty Company, a corporation, the defendant in the above entitled action, will on the 27th day of June, 1939, file in said action in said Court, the petition and bond of said defendant, copies of which are hereto attached and served upon you, for removal of said cause to the District Court of the United for the District of Montana, Great Falls Division, and will on said date at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, present said petition and bond so filed in the above entitled Court, and move said Court for an order removing said

cause to the District Court of the United States, for the District of Montana, in accordance with said Petition and Bond.

Dated this 19th day of June, 1939.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant.

[Endorsed]: Filed July 20, 1939. C. R. Garlow, Clerk. [16]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant.

BOND ON REMOVAL

Know All Men By These Presents, That we, United States Fidelity and Guaranty Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, authorized and licensed to do business within the State of Montana, as surety, are held and firmly bound unto the plaintiff above named, in the penal sum of Three

Hundred and no/100 Dollars (\$300.00), lawful money of the United States, to be paid to the said plaintiff, her heirs, executors, administrators, successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents,

Whereas, the above entitled suit was brought by the above named plaintiff in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the above named defendant, and is now pending in said state court and is removable into the District Court of the United States for the District of Montana, and the said defendant, United States Fidelity and Guaranty [17] Company, a corporation, has petitioned said State Court for such removal,

Now, Therefore, if the said defendant shall enter in the said District Court of the United States within thirty days from the date of filing said petition as provided by law, a certified copy of the records of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise it shall remain in full force and virtue.

Sealed with our seals and dated the 19th day of June, 1939.

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY, a corporation,

(Corporate Seal) By DON W. JACOBUS
Manager and Attorney-in-fact
Principal.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
a corporation,

(Corporate Seal) By A. B. KALIN
Its Attorney-in-Fact
Surety.

I hereby approve the above bond this 20th day of June, 1939.

H. H. EWING
Judge.

[Endorsed]: Filed July 20, 1940. C. R. Garlow,
Clerk. [18]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Defendant.

ORDER

The defendant herein, United States Fidelity and Guaranty Company, a corporation, having within the time provided by law, filed its petition for removal in this cause to the District Court of the United States for the District of Montana, and having at the same time offered its bond in the sum of Three Hundred Dollars (\$300.00), with good and sufficient surety, pursuant to statute, and conditioned to law;

It Is Ordered by the Court that said Petition be accepted; that said Bond be approved and accepted; that this cause be removed for trial to the District Court of the United States for the District of Montana, pursuant to the statute of the United States; and that all other proceedings in this Court be stayed.

Dated this 27th day of June, 1939.

H. H. EWING

Judge.

[Endorsed]: Filed July 20, 1940. C. R. Garlow,
Clerk. [19]

In the District Court of the Eighth Judicial Dis-
trict of the State of Montana, in and for the
County of Cascade.

ETHEL M. DOHENY, as Administratrix of the
Estate of ROBERTA DOHENY, deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Defendant.

CLERK'S CERTIFICATE

I, George Harper, Clerk of the District Court of
the Eighth Judicial District of the State of Mon-
tana, in and for the County of Cascade, do hereby
certify that the above and foregoing transcript con-
tains full, true and correct copies of the original
papers filed in this Court in the case of Ethel M.
Doheny, as Administratrix of the Estate of Roberta
Doheny, deceased, vs. United States Fidelity and
Guaranty Company, a corporation, No. 28770, said
record consisting of the Complaint, filed in said suit
on the 2nd day of June, 1939, the Petition for Re-
moval of said suit to the United States District
Court for the District of Montana, filed in said suit
on the 20th day of June, 1939, the Bond for Re-

moval, the Notice of Petition and Bond, and the Order of Removal of suit to said United States District Court for the District of Montana, entered on record in said suit on the 27th day of June, 1939.

[20]

And I further certify that said transcript is by me transmitted to the District Court of the United States in and for the District of Montana, Great Falls Division, pursuant to such order of removal.

Witness my hand and the seal of said Court at Great Falls, Montana, this 20th day of July, 1939.

(Seal)

GEORGE HARPER

Clerk of Court.

By THOMAS T. DAVIES

Deputy

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk. [21]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Plaintiff,

v.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Defendant.

COMPLAINT

The plaintiff for her cause of action against the defendant complains and alleges:

I.

The plaintiff is informed and believes and therefore alleges that at all times hereinafter mentioned the defendant, United States Fidelity and Guaranty Company, was and still is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do and doing business within the State of Montana.

II.

That on or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, appointed Administratrix of the Estate of Marguerite Doheny, Deceased, by an order of said court, duly given, made and entered on said date in the matter of the Estate of Marguerite Doheny, Deceased, and thereafter letters of administration in the Estate of Marguerite Doheny, Deceased, were duly issued to plaintiff under the seal of said court and the hand of the Clerk of said court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Marguerite Doheny, Deceased. [22]

III.

That on or about the 20th day of September, 1934,

John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the payment of said co-partners by the State of Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars (\$15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of \$15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all respects of the provisions of said contract by the said co-partners and recited the sum of \$15,615.66 as the penalty thereof.

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least \$10,000.00 for one person and a [23] total of \$20,000.00 for one accident and promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of \$10,000.00 for one person and \$20,000.00 for one accident. That plaintiff has heretofore demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty Company, and said co-partners and said defendant have failed and refused to furnish either thereof and that plaintiff is informed and believes and therefore alleges that under the provisions of said insurance policy and in accord-

ance with the provisions of the agreement between the said co-partners and the State of Montana the defendant corporation promised and agreed to pay all claims from liability imposed upon the aforesaid co-partners by law for damages on account of bodily injuries including death at any time resulting therefrom sustained by any of the public by reason of the carrying on of the work mentioned and described in the contract between said co-partners and the State of Montana in connection with the public Highway mentioned in said contract, and expressly provided in said policy that any person of the public sustaining injuries and damages as aforesaid or his or her personal representative was authorized to institute and maintain an action against the defendant corporation for the amount of any judgment obtained in an action theretofore brought against the said co-partners for such damages and injuries in case execution on said judgment against the said co-partners be returned unsatisfied.

V.

That thereafter and on or about the 12th day of December, 1934, and while carrying on the work mentioned and described in the [24] written agreement between the co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Marguerite Doheny and that at the time the said Marguerite Doheny was a member of the public and said automobile was

then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District in the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Marguerite Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of \$5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore been made by plaintiff.

VI.

That thereafter the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest thereon has been paid and that

plaintiff still is the owner and holder of said judgment.

VII.

That thereafter on or about the 17th day of August, 1937, an execution was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring [25] the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District Court of Cascade County, on or about the 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

That the said co-partners had fully complied with all the requirements and conditions precedent enumerated in the aforesaid policy and that plaintiff has complied with all the requirements and conditions precedent and is entitled to maintain this action against the defendant, United States Fidelity and Guaranty Company, to recover the sum of \$5,116.89 and accrued and accruing interest thereon from May 4, 1936, and became so entitled to maintain said action on or about the 10th day of September, 1937, upon the return of the execution not satisfied and by virtue of the judgment rendered and against the said co-partners and finally deter-

mined by the aforesaid Supreme Court on appeal on or about the 5th day of June, 1937.

IX.

That plaintiff is informed and believes and therefore alleges that the defendant, United States Fidelity and Guaranty Company retained attorneys and paid the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid and that said defendant retained the attorneys and paid for their services rendered and paid the expenses connected with the appeal of the aforesaid action to the Supreme Court of the State of Montana from the judgment given, made and entered by the aforesaid District Court in said action.

X.

That heretofore on or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is hereto annexed marked "Exhibit A" and by this reference [26] made a part hereof. That said defendant has failed to make payment of said judgment either in whole or in part.

Wherefore, Plaintiff prays judgment against the defendant for the sum of \$5,116.89 and interest thereon at the rate of Six Per Cent (6%) per annum from May 4, 1936, and costs of this action and for such other and further relief as may be equitable, just and proper.

E. J. McCABE

Attorney for Plaintiff.

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn deposes and says:

That he is the attorney for plaintiff named in the foregoing complaint, and makes this verification for the reason that plaintiff is absent from Cascade County, Montana, wherein affiant resides and maintains his office and where this verification is made:

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of this affiant.

E. J. McCABE

Subscribed and sworn to before me this 24th day of April, 1939.

(Notarial Seal) KATHLEEN SMESTAD
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Mar. 31, 1942. [27]

“EXHIBIT A”

Great Falls, Montana

May 13, 1938

United States Fidelity and Guaranty Company
Baltimore, Maryland

Gentlemen:

On or about the 20th day of September, 1934,
John M. Coverdale and E. O. Johnson, co-partners

doing business under the name of Coverdale and Johnson, entered into a written contract with the State Highway Commission of the State of Montana for the performance of certain work and the furnishing of certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana. At the time of the making of said contract the said John M. Coverdale and E. O. Johnson, co-partners as aforesaid, as Principal and your Company as surety, executed and delivered a certain contract bond in writing in the principal sum of \$15,615.66, the condition of which bond was that the aforesaid co-partners would in all respects faithfully perform all of the provisions of the aforesaid contract between said co-partners and the State of Montana acting by and through the State Highway Commission.

The aforesaid Highway Contract contained the following provision:

"The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least \$10,000.00 for one person and a total of \$20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance."

Thereafter your Company notified the State Highway Commission of Montana by written com-

munication that you had written a public liability policy of insurance in accordance with the terms and provisions of aforesaid contract to and with the aforesaid co-partners in the amount of \$10,000.00 for one person and a total of \$20,000.00 for one accident. Thereafter, one Marguerite Doheny was killed as a result of the grossly negligent and reckless operation of an instrumentality being used by said co-partners at the time in carrying on the prosecution of the work under aforesaid Highway contract. An action was thereafter instituted in the District Court of the 8th Judicial District of the State of Montana in and for the County of Cascade by the undersigned, Ethel M. Doheny, as Administratrix of the estate of Marguerite Doheny, deceased, to recover from said co-partners damages by reason of the injuries and death of aforesaid Marguerite Doheny by reason of the alleged grossly negligent and reckless operation of aforesaid instrumentality while carrying on the prosecution of work under the aforesaid Highway contract, in which action a judgment was duly given, made and entered by said Court on the verdict on the 4th day of May, 1936, of the jury empanelled to try said action against the said co-partners, as defendants, for the sum of \$5000.00 together with the additional sum of \$116.89 costs together with interest thereon at the rate of 6% per annum, and which action was defended at your direction by Attorneys employed by your Company and to whom you paid and Attorney's fee for their services rendered in said action.

An appeal was taken to the Supreme Court of Montana from the judgment in said action by aforesaid Attorneys at your suggestion and the services of said Attorneys rendered on said appeal were paid by your Company. Thereafter, the judgment of the lower Court was duly affirmed by the Supreme Court. Said judgment has not been paid nor any part thereof and the undersigned as Administratrix aforesaid still is the owner and holder of said Judgment.

At the direction of the undersigned, E. J. McCabe, her attorney, made oral demand for payment of the aforesaid judgment upon Don Jacobus, your agent at Helena, Montana, and was informed by said agent that your Company claimed non-liability for payment of said judgment and refused payment thereof.

An execution on aforesaid judgment has been heretofore duly issued and delivered to the Sheriff for levy and enforcement of said judgment against property of aforesaid co-partners and the said execution has been returned unsatisfied either in part or in whole by reason of inability to locate any property of aforesaid co-partners.

At the direction of the undersigned, her aforesaid Attorney has conducted an investigation for the purpose of finding any property of aforesaid co-partners available for execution and no property of any kind has been located.

Demand is hereby made that you pay the undersigned, as Administratrix, aforesaid, the aforesaid

judgment in the sum of \$5,116.89 with interest from May 4th, 1936, at the rate of 6% per anum, and in the event of your failure to comply with this demand, notice is hereby given that the undersigned will institute suit to enforce payment of said judgment.

A copy of the within demand is being delivered to your agent at Helena, Montana.

Very truly yours,

ETHEL M. DOHENY

414 Strain Building

Great Falls, Montana

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk. [29]

In the District Court of the Eighth Judicial District
of the State of Montana, in and for the County
of Cascade

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Defendant.

PETITION FOR REMOVAL

Comes now United States Fidelity and Guaranty
Company, a corporation, the defendant named in

the above entitled action and makes and presents this its petition for removal of the above entitled action to the District Court of the United States for the District of Montana, and respectfully shows and alleges as follows:

I.

That the above entitled action is an action in which there is a controversy which is wholly between citizens of different states. That the plaintiff in said action was, at the occurrences relied upon in the complaint, and at the time of the commencement of this action, and still is, a resident and citizen of the State of Montana.

II.

That the defendant, United States Fidelity and Guaranty Company is now, and at all of the times mentioned in plaintiff's complaint has been, and was at the time of the commencement of the above entitled action, a corporation duly [30] organized and existing under and by virtue of the laws of the State of Maryland, licensed to do business in Montana, and a citizen and resident of the State of Maryland, and a non-resident of the State of Montana.

III.

That on or about the 2nd day of June, 1939, the plaintiff herein filed the above entitled action against the above named defendant in the District Court of the Eighth Judicial District of the State

of Montana, in and for the County of Cascade, said action being Cause No. 28769 in said court and district. That in the above entitled action the plaintiff seeks to recover from the defendant United States Fidelity and Guaranty Company, a corporation, the sum of Five Thousand One Hundred Sixteen and 89/100 Dollars (\$5116.89) which amount allegedly represents the amount of a certain judgment given, made and entered by the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in favor of the above named plaintiff in an action by the above named plaintiff against John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson.

That in the above entitled action the plaintiff seeks to recover the amount of said judgment, to-wit, the sum of Five Thousand One Hundred Sixteen and 89/100 Dollars (\$5116.89), together with interest, from the defendant United States Fidelity and Guaranty Company on the ground that said defendant had issued to the said John M. Coverdale and E. O. Johnson as said co-partners, doing business under the firm name of Coverdale & Johnson, a contractors' public liability insurance policy with a liability of \$10,000.00 for one [31] person and a total of \$20,000.00 for one accident and plaintiff further alleges that by reason of the issuance of said policy of insurance the said defendant United States Fidelity and Guaranty Company is legally bound and obligated to pay the said judg-

ment in the amount of Five Thousand One Hundred Sixteen and 89/100 Dollars (\$5116.89), together with interest from and after May 4, 1936.

That the matter and amount in dispute and controversy in said suit exceeds, exclusive of interest and costs, a sum or value of Three Thousand and no/100 Dollars (\$3000.00), all of which more fully appear from the complaint in said action, which is hereby referred to and made a part hereof.

IV.

That the defendant makes and files herewith a bond in the sum of Three Hundred and no/100 Dollars (\$300.00), with good and sufficient surety for their entering in the District Court of the United States for the District of Montana, within thirty days from the date of filing this petition a certified copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States, if it shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore, this petitioner prays this court to proceed no further herein except to accept this petition and said bond and to make an order requiring said defendant to enter and file a certified copy of the record herein in the said District Court of the United States for the District of [32] Montana, within thirty days from the filing of this petition, as provided by law.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant [33]

State of Montana,
County of Lewis and Clark—ss.

Don W. Jacobus, being first duly sworn upon his oath, deposes and says: That he is the Manager for the defendant, United States Fidelity and Guaranty Company, a corporation, and that he makes this verification as such manager for and on behalf of said defendant and that he is duly authorized to make the same; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true.

DON W. JACOBUS

Subscribed and sworn to before me this 19th day of June, 1939.

[Seal]

W. T. BOONE

Notary Public for the State of Montana.
Residing at Missoula, Montana.

My commission expires Aug. 2, 1941.

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk. [34]

In the District Court of the Eighth Judicial District
of the State of Montana, in and for the County
of Cascade

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Defendant.

NOTICE OF PETITION AND BOND
FOR REMOVAL

To Ethel M. Doheny, as Administratrix of the Es-
tate of Marguerite Doheny, Deceased, the above
named plaintiff:

To E. J. McCabe, plaintiff's attorney:

You and each of you are hereby notified that
United States Fidelity and Guaranty Company, a
corporation, the defendant in the above entitled
action, will on the 27th day of June, 1939, file in
said action in said Court, the petition and bond of
said defendant, copies of which are hereto attached
and served upon you, for removal of said cause to
the District Court of the United States for the Dis-
trict of Montana, Great Falls Division, and will on
said date at the hour of 10 o'clock A. M., or as soon
thereafter as counsel can be heard, present said
petition and bond so filed in the above entitled

Court, and move said Court for an order removing said cause to the District Court of the United States, for the District of Montana, in accordance with said Petition and Bond.

Dated this 19th day of June, 1939.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk. [35]

In the District Court of the Eighth Judicial District
of the State of Montana, in and for the County
of Cascade

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Defendant.

BOND ON REMOVAL

Know all men by these presents, That we, United States Fidelity and Guaranty Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, authorized and

licensed to do business within the State of Montana, as surety, are held and firmly bound unto the plaintiff above named, in the penal sum of Three Hundred and no/100 Dollars (\$300.00), lawful money of the United States, to be paid to the said plaintiff, her heirs, executors, administrators, successors and assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents,

Whereas, the above entitled suit was brought by the above named plaintiff in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the above named defendant, and is now pending in said state court and is removable into the District Court of the United States for the District of Montana, and the said defendant, United States Fidelity and Guaranty [36] Company, a corporation, has petitioned said State Court for such removal,

Now, therefore, if the said defendant shall enter in the said District Court of the United States within thirty days from the date of filing said petition as provided by law, a certified copy of the records of said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise it shall remain in full force and virtue.

Sealed with our seals and dated the 19th day of
June, 1939.

[Corporate Seal] UNITED STATES FIDELITY
AND GUARANTY COMPANY

a corporation,

By DON W. JACOBUS

Manager and Attorney-in-fact

Principal

[Corporate Seal] FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

a corporation,

By A. B. KALIN

Its Attorney-in-Fact

Surety

I hereby approve the above bond this 20th day of
June, 1939.

C. F. HOLT

Judge

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk. [37]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Defendant,

ORDER

The defendant herein, United States Fidelity and Guaranty Company, a corporation, having within the time provided by law, filed its petition for removal in this cause to the District Court of the United States for the District of Montana, and having at the same time offered its bond in the sum of Three Hundred Dollars (\$300.00), with good and sufficient surety, pursuant to statute, and conditioned to law;

It is ordered by the Court that said Petition be accepted; that said Bond be approved and accepted; that this cause be removed for trial to the District Court of the United States for the District of Montana, pursuant to the statute of the United States; and that all other proceedings in this Court be stayed.

Dated this 27th day of June, 1939.

C. F. HOLT

Judge.

[Endorsed]: Filed July 20, 1939, C. R. Garlow,
Clerk. [38]

In the District Court of the Eighth Judicial Dis-
trict of the State of Montana, in and for the
County of Cascade.

ETHEL M. DOHENY, as Administratrix of the
Estate of MARGUERITE DOHENY, De-
ceased,

Plaintiff,

vs.

UNITED STATES FIDELITY and GUARANTY
COMPANY, a corporation,

Defendant.

CLERK'S CERTIFICATE

I, George Harper, Clerk of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, do hereby certify that the above and foregoing transcript contains full, true and correct copies of the original papers filed in this Court in the case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, deceased, vs. United States Fidelity and Guaranty Company, a corporation, No. 28769 said record consisting of the Complaint, filed in said

suit on the 2nd day of June, 1939, the Petition for Removal of said suit to the United States District Court for the District of Montana, filed in said suit on the 20th day of June, 1939, the Bond for Removal, the Notice of Petition and Bond, Affidavit, and the Order of Removal of suit to said United States District Court for the District of Montana, entered on record in said suit on the 27th day of June, 1939. [39]

And I further certify that said transcript is by me transmitted to the District Court of the United States in and for the District of Montana, Great Falls Division, pursuant to such order of removal.

Witness my hand and seal of said Court at Great Falls, Montana, this 20th day of July, 1939.

[Seal]

GEORGE HARPER

Clerk of Court.

By THOMAS T. DAVIES

Deputy

[Endorsed]: Filed July 20, 1939, C. R. Garlow, Clerk. [40]

Thereafter, on July 24, 1939, a Motion to Dismiss was filed in each cause herein, said Motions to Dismiss being in the words and figures following, to-wit:

[41]

In the District Court of the United States
District of Montana
Great Falls Division

No. 69

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY and GUARANTY
COMPANY, a corporation,
Defendant,

MOTION TO DISMISS

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation, and files this, its Motion to Dismiss, and moves the court for an order dismissing plaintiff's complaint upon the following grounds and for the following reasons:

I.

That said complaint fails to state a claim upon which relief can be granted.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant

[Endorsed]: Filed July 24, 1939, C. R. Garlow,
Clerk. [42]

In the District Court of the United States
District of Montana
Great Falls Division

No. 70

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY and GUARANTY
COMPANY, a corporation,
Defendant.

MOTION TO DISMISS

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation, and files this, its Motion to Dismiss, and moves the court for an order dismissing plaintiff's complaint upon the following grounds and for the following reasons:

I.

That said complaint fails to state a claim upon which relief can be granted.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant

[Endorsed]: Filed July 24, 1939, C. R. Garlow,
Clerk. [43]

Thereafter, on July 24, 1939, a Motion to Strike was filed in each cause herein, said Motions to Strike being in the words and figures following, to-wit: [44]

[Title of District Court and Cause—No. 69.]

MOTION TO STRIKE

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation, and files this, its Motion to Strike, and moves the court for an order striking the following portions of plaintiff's complaint on file herein, for the following reasons:

I.

That part of Paragraph III of plaintiff's complaint from and including the word "that" on Line 14 to and including the word "thereof" on Line 25, all on Page 2, for the reason and upon the ground that said portion of Paragraph III is redundant, immaterial, impertinent and surplusage.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant

[Endorsed]: Filed July 24, 1939. [45]

[Title of District Court and Cause—No. 70.]

MOTION TO STRIKE

Now comes the defendant, the United States Fidelity and Guaranty Company, a corporation,

and files this, its Motion to Strike, and moves the court for an order striking the following portions of plaintiff's complaint on file herein, for the following reasons:

I.

That part of Paragraph III of plaintiffs' complaint from and including the word "that" on Line 14 to and including the word "thereof" on Line 25, all on Page 2, for the reason and upon the ground that said portion of Paragraph III is redundant, immaterial, impertinent and surplusage.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant

[Endorsed]: Filed July 24, 1939. [46]

Thereafter, on September 8, 1939, the Motions to Strike, and Motions to Dismiss, were overruled and denied, the record of hearing thereon, and order thereon, being in the words and figures following, towit: [47]

[Title of District Court and Cause—No. 69]

This cause was duly called for hearing this day on defendant's motion to strike from the complaint and on defendant's motion to dismiss, Mr. E. J. McCabe appearing for the plaintiff and there being no appearance by counsel for the defendant.

And thereupon, after hearing the argument of counsel for plaintiff court ordered that both of said motions be overruled and denied, and that defendant be granted ten days from receipt of notice of this ruling within which to answer.

Entered in open court on September 8, 1939, at Great Falls, Montana.

C. R. GARLOW,
Clerk [48]

[Title of District Court and Cause—No. 70]

This cause was duly called for hearing this day on defendant's motion to strike from the complaint and on defendant's motion to dismiss, Mr. E. J. McCabe appearing for the plaintiff and there being no appearance by counsel for the defendant.

And thereupon, after hearing the argument of counsel for plaintiff, court ordered that both of said motions be overruled and denied, and that defendant be granted ten days from receipt of notice of this ruling within which to answer.

Entered in open court this 8th day of September, 1939, at Great Falls, Montana.

C. R. GARLOW,
Clerk [49]

Thereafter, on September 23, 1939, an Answer was filed in each of the causes herein, being in the words and figures following, towit: [50]

[Title of District Court and Cause—No. 69]

ANSWER

Comes now the above named defendant, United States Fidelity and Guaranty Company, a corporation, and for its answer to plaintiff's complaint on file herein admits, denies and alleges:

I.

The defendant admits the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

Answering paragraph IV of plaintiff's complaint the defendant admits that under the provisions of paragraph 7.11 of Section 7 of the written agreement between the co-partners, Coverdale & Johnson and the State of Montana, the co-partners promised and agreed to carry public liability insurance on the work and that the defendant issued to said co-partners, Coverdale & Johnson, a contractor's public liability insurance policy and notified the Montana Highway [51] Commission in writing that said contractor's public liability insurance policy had been issued to said co-partners, Coverdale & Johnson. In this connection the defendant alleges that said contractor's public liability insurance policy so issued by it to said co-partners, Coverdale & Johnson, contained an exclusion under which the

driving or using of any vehicle or automobile was excepted from the coverage provided in said policy.

The defendant denies each, every and all of the other allegations contained in said paragraph IV of plaintiff's complaint.

III.

Answering paragraphs V, VI and VII of plaintiff's complaint the defendant alleges that it has not sufficient knowledge or information upon which to base a belief with respect to the allegations therein contained and therefore denies said paragraphs and each and all of the allegations therein contained.

IV.

The defendant denies each, every and all of the allegations contained in paragraph VIII of plaintiff's complaint.

V.

The defendant denies each, every and all of the allegations contained in paragraph IX of plaintiff's complaint and in this connection alleges that such legal services and investigation as were furnished by the defendant were furnished under the provisions of said contractor's public liability insurance policy notwithstanding the provision therein excepting liability in the using or driving of [52] vehicles or automobiles.

VI.

Answering paragraph X of plaintiff's complaint the defendant admits that on or about May 13th,

1938, plaintiff served defendant with a letter, copy of which is attached to plaintiff's complaint as Exhibit "A", and admits that the defendant has not paid said alleged judgment either in whole or in part.

VII.

Further answering plaintiff's complaint the defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered plaintiff's complaint, the defendant prays that plaintiff take nothing by her said complaint and that the defendant recover its costs herein disbursed and expended.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant.

[53]

State of Montana

County of Missoula—ss.

W. T. Boone, being first duly sworn, upon his oath, deposes and says: That he is one of the attorneys for the defendant in the above entitled action; that he makes this verification for and on behalf of said defendant for the reason that the defendant, United States Fidelity and Guaranty Company is a corporation and has no officer or agent within the county where affiant resides and has his office; that he has read the foregoing Answer and knows the contents thereof and that the matters

and things therein stated are true to the best of his knowledge, information and belief.

W. T. BOONE

Subscribed and sworn to before me this 22nd day of September, 1939.

[Seal] MARY O. CLASBEY

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires Oct. 4, 1940.

[Endorsed]: Filed Sept. 23, 1939. [54]

[Title of District Court and Cause—No. 70.]

ANSWER

Comes now the above named defendant, United States Fidelity and Guaranty Company, a corporation, and for its answer to plaintiff's complaint on file herein admits, denies and alleges:

I.

The defendant admits the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

Answering paragraph IV of plaintiff's complaint the defendant admits that under the provisions of paragraph 7.11 of Section 7 of the written agreement between the co-partners, Coverdale & Johnson and the State of Montana, the co-partners promised

and agreed to carry public liability insurance on the work and that the defendant issued to said co-partners, Coverdale & Johnson, a contractor's public liability insurance policy and notified the Montana Highway [55] Commission in writing that said contractor's public liability insurance policy had been issued to said co-partners, Coverdale & Johnson. In this connection the defendant alleges that said contractor's public liability insurance policy so issued by it to said co-partners, Coverdale & Johnson, contained an exclusion under which the driving or using of any vehicle or automobile was excepted from the coverage provided in said policy.

The defendant denies each, every and all of the other allegations contained in said paragraph IV of plaintiff's complaint.

III.

Answering paragraphs V, VI and VII of plaintiff's complaint the defendant alleges that it has not sufficient knowledge or information upon which to base a belief with respect to the allegations therein contained and therefore denies said paragraphs and each and all of the allegations therein contained.

IV.

The defendant denies each, every and all of the allegations contained in paragraph VIII of plaintiff's complaint.

V.

The defendant denies each, every and all of the allegations contained in paragraph IX of plaintiff's complaint and in this connection alleges that such legal services and investigation as were furnished by the defendant were furnished under the provisions of said contractor's public liability insurance policy notwithstanding the provision therein excepting liability in the using or driving of [56] vehicles or automobiles.

VI.

Answering paragraph X of plaintiff's complaint the defendant admits that on or about May 13th, 1938, plaintiff served defendant with a letter, copy of which is attached to plaintiff's complaint as Exhibit "A", and admits that the defendant has not paid said alleged judgment either in whole or in part.

VII.

Further answering plaintiff's complaint the defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered plaintiff's complaint, the defendant prays that plaintiff take nothing by her said complaint and that the defendant recover its costs herein disbursed and expended.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant. [57]

State of Montana,
County of Missoula—ss.

W. T. Boone, being first duly sworn, upon his oath, deposes and says: That he is one of the attorneys for the defendant in the above entitled action; that he makes this verification for and on behalf of said defendant for the reason that the defendant, United States Fidelity and Guaranty Company is a corporation and has no officer or agent within the county where affiant resides and has his office; that he has read the foregoing Answer and knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge, information and belief.

W. T. BOONE

Subscribed and sworn to before me this 22nd day of September, 1939.

[Seal] MARY O. CLASBEY

Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires Oct. 4, 1940.

[Endorsed]: Filed Sept. 23, 1939. [58]

Thereafter, on October 10, 1940, a Transcript of Proceedings was filed herein, in the words and figures following, towit: [59]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 69

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Defendant,

and

No. 70

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Defendant.

DEFENDANT'S PROPOSED TRANSCRIPT
OF PROCEEDINGS

Appearances:

For Plaintiff:

E. J. McCabe,
Attorney at Law,
Great Falls, Montana.

For Defendant:

Toole & Boone,
Attorneys at Law,
Missoula, Montana. [60]

[Title of District Court and Causes.]

Be it remembered: That the above entitled causes came on regularly for trial at Great Falls, Montana, on Tuesday, the 26th day of December, 1939, at 2:00 o'clock P. M., before the Honorable Charles N. Pray, Judge Presiding, sitting without a jury. The plaintiff, in each of said causes, was personally present in Court and represented by her Attorney, E. J. McCable of Great Falls, Montana. The defendant, in each of said causes, was represented by Messrs. Toole & Boone of Missoula, Montana.

Thereupon the following proceedings were had and taken and the following evidence was introduced:

The Court: We have two cases on the calendar for this afternoon. Are you ready for the plaintiff?

Mr. McCabe: Plaintiff is ready.

The Court: Is the defendant ready?

Mr. Toole: Defendant is ready.

The Court: Very well. These cases, as I understand it, are to be consolidated?

Mr. McCabe: Yes, your Honor.

The Court: Any objection?

Mr. Toole: No objection.

The Court: Very well. Call your first witness.

Plaintiff's Case

Whereupon,

JULIUS G. HILGARD,

a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. McCabe:

Q. What is your name?

A. Julius G. Hilgard.

Mr. Toole: The defendant, in both of these cases, objects to the introduction of any evidence on the ground and for the [61] reason that the complaints in these actions do not state facts sufficient upon which to base a claim against the defendant.

The Court: I will overrule the objection. Proceed.

The Witness: I hold the official position of Deputy Clerk of Court of the County of Cascade, State of Montana, and as such have the custody

(Testimony of Julius G. Hilgard.)

of the records and files of all actions instituted, pending and disposed of in the District Court of Cascade County, Montana. Being shown proposed exhibits numbered 1 to 25 inclusive, and having examined the same I will state they are official District Court records of Cascade County in the case appearing on each exhibit.

Mr. Toole: They can all be offered together. The same objection will go to all of them.

Mr. McCabe: Let the record show that the offering of these individual exhibits separately is dispensed with, and they may be offered in a group. We offer plaintiff's exhibits 1 to 25 inclusive. Counsel, I believe, stated that he would stipulate that both of these cases were tried as consolidated in the District Court of Cascade County and in the Supreme Court of Montana and both judgments were affirmed. That is stipulated to, is it not?

Mr. Toole: I don't think I could stipulate exactly in that language. I am prepared to stipulate that the offered exhibits are the originals and authenticated documents filed in the office of the Clerk of Court of Cascade County; that the remittitur is the authenticated document from the Supreme Court; that the Bill of Exceptions is the actual Bill of Exceptions that was settled in the consolidated cases; that no objection is made to the authentication of the documents offered. [62]

The Court: What is your objection to the offer?

Mr. Toole: Now, if your Honor please, the de-

(Testimony of Julius G. Hilgard.)

defendant objects to all the documents offered first, because they are immaterial in this action, secondly, because they serve only to encumber the record, and in the third place the documents do not offer any proof of any of the facts pleaded in plaintiff's complaint, with the exception of the two judgments and the remittitur, and for that reason they are immaterial, and do not tend to prove or disprove any issue in this case.

The Court: Do you deny them in your answer?

Mr. Toole: I think some of them are denied.

The Court: I think you have denied everything in the answer.

Mr. Toole: Practically.

The Court: What is your further objection?

Mr. Toole: I want to say for the Court, and for the record, that the pleadings in these cases plead certain facts. The defendant objects to all of the exhibits, because all of the facts there pleaded were denied in the lower court, and most of those facts are here denied. If the same exhibits were offered separately, they could be objected to on that basis here.

The Court: All the pleadings are offered here, are they not?

Mr. McCabe: Yes.

Mr. Toole: And there is no substantive proof of those exhibits of any kind whatever.

The Court: I will overrule the objection. They are admitted in evidence. Proceed with your examination.

(Testimony of Julius G. Hilgard.)

Whereupon, plaintiff's exhibits 1 to 25, both inclusive, were received in evidence and filed with the Clerk of the [63] Court and said exhibits bear the following titles:

Plaintiff's Exhibit 1, Original Complaint in the District Court of Cascade County, Montana, in the case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 2, Original Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 3, Original Separate Answer of Defendant Coverdale & Johnson, a co-partnership in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 4, Original Reply to Separate Answer of Defendants Coverdale & John-

(Testimony of Julius G. Hilgard.)

son, a co-partnership, in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 5, Original Reply to Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 6, Original Affidavit of Service in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 7, Original Order Taxing Costs and Disbursements in said case of Ethel M. Doheny, as Administratrix of the [64] Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 8, Original Verdict in said case of Ethel M. Doheny, as Administra-

(Testimony of Julius G. Hilgard.)

trix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 9, Original Judgment on Verdict in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 10, Original Notice of Appeal in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 11, Original Remittitur from the Supreme Court of the State of Montana affirming the judgment in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 12, Original Notice of Filing Remittitur in said case of Ethel M. Doheny, as Administratrix of the Estate of Ro-

(Testimony of Julius G. Hilgard.)

berta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 13, Original Writ of Execution in said case of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 14, Original Complaint in the District Court of Cascade County, Montana, in the case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite [65] Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 15, Original Separate Answer of Defendant Coverdale & Johnson, a co-partnership in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 16, Original Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of

(Testimony of Julius G. Hilgard.)

the Estate of Marguerite Doheny, deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 17, Original Reply to Separate Answer of Defendant John M. Coverdale in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 18, Original Reply to Separate Answer of Defendants Coverdale & Johnson, a co-partnership, in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 19, Original Affidavit of Service in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 20, Original Verdict in said case of Ethel M. Doheny, as Administra-

(Testimony of Julius G. Hilgard.)

trix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants. [66]

Plaintiff's Exhibit 21, Original Judgment on Verdict in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 22, Original Notice of Appeal in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 23, Original Notice of Filing Remittitur in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 24, Original Writ of Execution in said case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Cover-

(Testimony of Julius G. Hilgard.)

dale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

Plaintiff's Exhibit 25, Original Bill of Exceptions in the cases of Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants, and Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, Defendants.

[67]

PLAINTIFF'S EXHIBIT 9

[Title of District Court.]

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON
co-partners doing business under the firm name
and style of COVERDALE & JOHNSON,
Defendants.

JUDGMENT ON VERDICT

This action came on regularly for trial upon the 29th day of April, 1936, the said parties ap-

(Testimony of Julius G. Hilgard.)

peared by their Attorneys Messrs. Hall & McCabe and Edw. C. Alexander Counsel for Plaintiff, and Messrs. Howard Toole and W. T. Boone for Defendants. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of Plaintiff and Defendants were sworn and examined. After hearing the evidence, the arguments of Counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court their verdict as follows:

“We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Roberta Doheny, deceased, and against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of \$5,000.00.

Dated this 2nd day of May, 1936.

CLARENCE W. WILSON

Foreman.” [68]

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Roberta Doheny, deceased, have judgment against the defendants, John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson in the sum of \$5,000.00 and

(Testimony of Julius G. Hilgard.)
that said plaintiff have judgment against said de-
fendants for her costs herein in the sum of \$243.26.

Judgment entered this 4th day of May A. D.
1936.

(Court Seal) GEORGE HARPER

Clerk.

By J. G. HILGARD

Deputy Clerk.

PLAINTIFF'S EXHIBIT 21

[Title of District Court.]

ETHEL M. DOHENY, as administratrix of the
Estate of Marguerite Doheny, deceased,
Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON
co-partners doing business under the firm name
and style of COVERDALE & JOHNSON,
Defendants.

JUDGMENT ON VERDICT

This action came on regularly for trial upon the
29th day of April, 1936, the said parties appeared
by their Attorneys Messrs. Hall & McCabe and
Edw. C. Alexander Counsel for Plaintiff, and
Messrs. Howard Toole and W. T. Boone for De-
fendants. A jury of twelve persons was regularly

(Testimony of Julius G. Hilgard.)

empaneled and sworn to try said cause. Witnesses on the part of Plaintiff and [69] Defendants were sworn and examined. After hearing the evidence, the arguments of Counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court their verdict as follows:

“We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Marguerite Doheny, Deceased, and against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of \$5,000.00.

Dated this 2nd day of May, 1936.

CLARENCE W. WILSON
Foreman.”

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Marguerite Doheny, deceased, have judgment against the defendants, John M. Coverdale and E. O. Johnson co-partners, doing business under the firm name and style of Coverdale & Johnson in the sum of \$5,000.00 and that said plaintiff have judgment against said defendants for her costs herein in the sum of \$243.26.

(Testimony of Julius G. Hilgard.)

Judgment entered this 4th day of May A. D.
1936.

(Court Seal) GEORGE HARPER

Clerk.

By J. G. HILGARD

Deputy Clerk.

Mr. McCabe: As part of exhibit No. 24, and exhibit No. 13, we offer as part of the exhibits, the return of the Sheriff showing no property was found or located with which to satisfy the execution. [70]

Mr. Toole: Same objection to that.

The Court: Overruled. The executions with the returns are offered in evidence. They are there.

Mr. McCabe: They are annexed to the execution. I want the whole exhibits with the return of the Sheriff received in evidence.

Mr. Toole: The same objection to the return.

The Court: Overruled.

Mr. McCabe: If your Honor please, there were depositions that were taken in this cause.

The Court: Any cross examination?

Mr. Toole: No cross examination.

Witness Excused

Mr. McCabe: If your Honor please, may the record show that the original exhibits named be withdrawn and certified copies substituted, in view

of the fact that they are records of the District Court here?

Mr. Toole: No objection that that.

The Court: It may be done.

Mr. McCabe: If your Honor please, it is stipulated and agreed between the parties hereto that notice of the filing of the deposition of W. O. Whipps was in each case served upon the Attorneys for the defendant after the filing of the depositions in this Court.

The Court: Perhaps you better read it. They are both the same, those depositions. These cases are consolidated. We are only going to read one of the depositions.

Mr. McCabe: Is there any objection made to the notice of taking of the deposition, or as to the affidavit of mailing, or as to the formality in connection with the taking or the execu- [71] tion of the certificate, or that the officer was not duly sworn as stated in the certificate?

Mr. Toole: No objection.

Whereupon the deposition of W. O. Whipps in the case of Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, vs. United States Fidelity and Guaranty Company was read in evidence, as follows:

[Title of Court and Cause.]

DEPOSITION OF W. O. WHIPPS

Examination by Mr. McCabe:

The Witness: My name is W. O. Whipps, residence Helena, Montana. I am employed by the State Highway Commission of the State of Montana in the official capacity of Secretary and Administrative Engineer and was so employed during the months of September to December, inclusive, of 1934. During such months, and in that capacity I had custody of the original files and records of the State Highway Commission of the State of Montana. I have searched, and found and brought with me from the official records a contract entered into between the State Highway Commission of the State of Montana and John M. Coverdale and E. O. Johnson.

Being asked to examine this contract, marked plaintiff's exhibit 1, I am able to identify the signature of O. S. Warden thereon. He was the Chairman of the State Highway Commission on September 21, 1934. I am not able to identify the signatures of John M. Coverdale and E. O. Johnson thereon. I am able to identify the signature of Raymond E. Nagle and being shown that signature designated "By C. J. Dousman, Assistant" I can say that is the handwriting of Mr. Dousman. My attention being directed to the signature thereon "W. O. Whipps," that signature is mine. [72]

I am acquainted with the signature of Don W. Jacobus and the signature on the instrument "Don

(Deposition of W. O. Whipps.)

W. Jacobus" is the signature of Don W. Jacobus. My attention being directed to writing designated "Contract Bond" attached to this document, the signature thereon "Don W. Jacobus" is the signature of Don W. Jacobus.

This document, marked plaintiff's exhibit 1, is the contract held in the custody of the State Highway Commission as the original contract and the bond attached it is the bond being held as the bond executed to the State of Montana as the bond written pursuant to the provisions of the contract.

Mr. McCabe: Offer in evidence plaintiff's exhibit 1 as a part of the testimony of this witness.

Mr. Boone: To which the defendant objects on the ground that the instrument has not been properly identified; further as incompetent, irrelevant and immaterial, having no bearing upon the issues in this case. And the further objection that the offer of the exhibit is an attempt on the part of the plaintiff to vary the terms of a certain policy of insurance, which is the subject of this action.

The Court: Are these standard specifications, and do they relate particularly to this contract?

Mr. McCabe: Yes.

The Court: Overrule the objection.

The Witness: The Contract Bond, marked as plaintiff's exhibit 2, is the bond I have heretofore testified to as being annexed to the document marked plaintiff's exhibit 1.

Mr. McCabe: We offer plaintiff's exhibits 1 and

(Deposition of W. O. Whipps.)

2 as a part of the testimony of the deposition of this witness. [73]

Mr. Boone: To which the defendant objects in that the plaintiff's exhibit has not been properly authenticated and on the further ground that the exhibit is incompetent, irrelevant and immaterial, and has no bearing on the issues in this case; on the further ground it is an attempt on the part of the plaintiff to vary the terms of a certain insurance policy executed to John M. Coverdale and E. O. Johnson, which insurance policy is the subject of this action.

The Court: Overrule the objection.

Whereupon plaintiff's exhibits Nos. 1 and 2, on deposition, were received in evidence and filed with the Clerk of the Court and the material portions of said exhibits are as follows:

PLAINTIFF'S EXHIBIT 1 ON DEPOSITION STANDARD SPECIFICATIONS

Section 1

Definitions and Terms

1.8 "Surety" The corporate body which is bound with and for the Contractor, who is primary liable, and which engages to be responsible for his payment of all debts pertaining to and for his acceptable performance of the work for which he has contracted.

1.12 "Specifications" The directions, provisions, and requirements contained herein, together with

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

all written agreements made or to be made, pertaining to the method and manner of performing the work, or to the quantities and qualities of materials to be furnished under the contract.

1.13 "Contract" The agreement covering the performance of the work, and the furnishing of materials in the construction of same. The contract shall include the accepted "Proposal," [74] "Plans," "Specifications" and "Contract Bond," also any and all supplemental agreements which reasonably could be required to complete the construction of the work in a substantial and acceptable manner.

1.14 "Contract Bond" The approved form of security furnished by the Contractor and his Surety as a guaranty of good faith on the part of the Contractor to execute the work in accordance with the terms of the Contract.

1.15 "Highway" The whole right-of-way which is reserved for use in constructing the roadway and its appurtenances.

1.18 It should be understood thoroughly by all concerned that all things contained herein, together with the "Advertisement for Proposals" or "Notice to Contractors," and the "Contract Bond," as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these Specifications and Contract, and are to be considered one instrument. No papers attached to or

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

bound with any of the above shall be detached therefrom as all are a necessary part thereof.

Section 3

Award and Execution of Contract

3.4 Contract Bond Required.

The successful bidder, at the time of the execution of the Contract, must deposit, with the Commission, a surety bond for the full amount of the contract. The form of bond shall be that provided by the Commission and the surety shall be acceptable to the Commission. The surety bond must be executed by a surety company authorized by law to transact such business in the State of Montana and attached thereto must be a certificate under the seal of said surety company that [75] a full local agent's commission will be paid by said surety company to a licensed Montana agent of said surety company and that full credit for said bond and bond premiums has been entered upon the books of the Montana Branch office or Montana General Agency of said Surety company, providing said surety company maintains such Branch Office or General Agency.

Section 4

Scope of Work

4.1 Intent of Plans and Specifications.

The Contractor shall do all clearing and grubbing, make all excavations and embankments, do all

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)
shaping and surfacing, construct all ditches, drainage structures, bridges, and other appertain structures, as indicated in the proposal and on the plans; remove obstructions from within the lines of the highway and shall do such additional, extra and incidental work as may be considered necessary to complete the roadway to the proper lines, grades and cross-sections, in a substantial and workman-like manner. He shall furnish, unless otherwise provided, all implements, machinery, equipment, tools, material and labor necessary to the prosecution of the work. In short, the Contractor shall construct the improvement in strict accordance with the plans, specifications, special provisions, and contract, and when completed, shall leave it in a neat and finished condition.

4.3 Increased or Decreased Quantities.

The engineer reserves the right to make such alterations in the plans or in the quantities of work as may be considered necessary. Such alterations shall be in writing and shall not be considered as a waiver of any conditions of the contract nor to invalidate any of the provisions thereof, provided that no alteration shall [76] involve an extension or shortening of the length of the project of more than 25 per cent, and provided that a supplemental agreement with the contractor will be necessary when alterations involve (1) an increase or decrease of more than 25 per cent of the total cost of the

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

work calculated from the original proposal quantities and the contract unit prices, or (2) an increase of more than 25 per cent in the quantity of any one major contract item, including earth or common roadway excavation but not including excavation of any other class nor items of foundation piling. Alterations involving an increase of more than 25 per cent in the quantity of any one minor contract item will not require a supplemental agreement. Before work shall be started on any alteration requiring such supplemental agreement, the agreement setting forth an equitable adjustment of compensation satisfactory to the contractor shall be executed by the engineer and the contractor. The contractor shall perform the work as increased or decreased.

Section 7

Legal Relations and Responsibility to the Public

7.1 Laws to be Observed.

The Contractor shall at all times observe and comply with all Federal and State laws, and local by-laws, ordinances and regulations in any manner affecting the conduct of the work, and shall indemnify and save harmless the State and all of its officers, agents, and servants against any claim or liability arising from or based on the violation of any such law, by-law, ordinance, regulations, order or decree, whether by himself or his employees.

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

7.11 Responsibility for Damage Claims.

The Contractor shall save and keep harmless the State of Montana and any county, [77] city or town thereof against and from all losses to it from any cause whatever growing out of the prosecution of the work. The Engineer may retain from moneys due, or to become due, the Contractor, a sufficient amount to insure the enforcement of the provision.

The Contractor shall carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work. This insurance shall be in the amount of at least \$10,000.00 for one person and a total of \$20,000.00 for one accident. The Contractor shall submit adequate evidence to the Commission that he has taken out this insurance.

7.13 Contractor's Responsibility for Work.

(a) Until its acceptance by the Engineer, the improvement shall be under the care and charge of the Contractor, and he shall be responsible for and shall repair and make good any injury or damage to the improvement or to any part thereof from any cause whatsoever; except that the Contractor will not be held responsible for injury or damage to the improvement or any part thereof when, in the opinion of the Engineer, such damage is not the result of careless, negligent or dilatory work on the part of the Contractor, but is the result of unforeseen natural causes beyond the control of the Con-

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

tractor, such as violent storms, cloudbursts and floods. The judgment of the Engineer in this matter shall be final, and binding upon both parties to the contract. When a Contractor has, through dilatory methods and other causes within his control, exceeded his contract time unjustifiably, and has therefore been denied an extension of his contract time, the saving clause in the next preceding sentence shall not apply, but he shall be responsible for all damages of every nature. [78]

(b) The above saving clause shall not apply to bridge contracts. The Contractor in submitting proposals for such work must be governed by his own judgment as to probable weather and stream conditions and the actual resulting conditions will never be considered as unforeseen, but any loss or damage of any nature prior to acceptance of the improvement by the Engineer shall be the responsibility of the Contractor.

Section 9

Measurement and Payment

9.4 Extra and Force Account Work.

Extra work as hereinbefore described under the sub-heading "Scope of Work," shall be paid for either at agreed unit prices under the provisions of a "Supplemental Agreement," or on a "Force Account" basis, as shall have been agreed by the Engineer and Contractor before starting said work.

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)
Supplemental Agreement.

When it has been agreed to perform certain extra work not contemplated in the original Proposal and Contract on the basis of agreed prices, a "Supplemental Agreement" will be prepared fully describing said extra work, including the approximate quantity as nearly as may be arrived at in advance of the performance of the work, and the agreed unit prices. This "Supplemental Agreement" shall be executed by both parties to the original contract, shall thereupon be considered a part of the contract, and payment for the work included therein shall be for the actual quantity performed at the agreed unit prices set forth therein. Extra work provided for by a "Supplemental Agreement" shall not be started until after the execution of the said agreement. [79]

NOTICE TO CONTRACTORS

U. S. Public Works Highway Project
No. NRH-176"E", Unit-2 (1935)

Notice is hereby given that sealed bids for the construction of the improvement hereinafter described will be received by the State Highway Commission of Montana at the offices of the said Commission in the Capitol Building at Helena until 9:30 A.M. on Sep. 21, 1934, at which time and place they will be publicly opened and read.

The improvement contemplated consists of the construction of the following described structures

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)
on Section "E" of the Augusta-Sun River Road in
Lewis & Clark County:

1. A 2-span 79' concrete bridge across the South Fork Sun River.
2. A single panel 19' treated timber pile trestle.
3. Two standard treated timber stock passes.
4. A 5-panel 95' treated timber pile trestle bridge across Spring Coulee.
5. A 4-panel 76' treated timber pile trestle bridge across Dry Creek.

Contract

This Agreement, made in duplicate this 21st day of September A. D. 1934, between the State of Montana, by the State Highway Commission, hereinafter called the party of the first part, and John M. Coverdale and E. O. Johnson, a copartnership, doing business under the firm name of Coverdale & Johnson their heirs, executors, administrators and assigns, party of the second part, hereinafter called the Contractor.

Witnesseth, That the Contractor, for and in consideration of the payment or payments herein specified and agreed to by [80] the party of the first part, hereby covenants and agrees to furnish, and deliver and pay for all the materials, and to furnish all tools, machinery and implements, and to do and perform all the work and labor in the construction or improvement of certain bridges in Lewis & Clark County, State of Montana, U. S. Public Works

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

Highway Project No. NRH-176 "E," Unit 2 (1935), according to the dimensions and grades thereof this day agreed upon between the said parties and shown and stated in the plans and specifications hereto annexed, at the unit prices bid by the said Contractor for the respective estimated quantities, aggregating approximately the sum of Fifteen thousand six hundred fifteen and 66/100 Dollars (\$15,615.66) and such other items as are mentioned in their original proposal, which proposal and prices named, together with the annexed specifications are made a part of this contract and accepted as such, and also the plans of the improvement prepared by the State Highway Commission, are also agreed by each party as being a part hereof; the said improvement being situated as follows: 1 concrete bridge and 5 treated timber pile trestle bridges and stock passes on the Augusta-Sun River Road in Lewis & Clark County.

It is understood by and between the parties hereto that the work included in this contract is to be done under the direction of the Engineer of the State Highway Commission and that his decision as to the construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Engineer, and the

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

parties hereto agree to conform to and abide by the same so far as they may be consistent with the [81] purpose and intent of the original drawings and specifications referred to herein. It is further understood that the work shall be subject to inspection at all times and approval by the United States Secretary of Agriculture, or his agents, and shall be performed in accordance with the laws of the State of Montana and the rules and regulations of the said Secretary of Agriculture made pursuant to that certain act of Congress approved July 11, 1916, (39 U. S. Statutes at Large, 335) entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," and all Acts of Congress supplementary and amendatory thereto.

The contractor further covenants and agrees that all of said work and labor shall be done and performed in the best and most workmanlike manner and that all and every of said materials and labor shall be in strict and entire conformity, in every respect, with the said specifications and plans and shall be subject to the inspection and approval of the Engineer of the State Highway Commission, or his duly authorized assistant, and, in case any of said materials or labor shall be rejected by the said Engineer, or his assistant, as defective or unsuitable, then the said materials shall be removed and replaced with other approved materials and the said

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

labor shall be done anew, to the satisfaction and approval of the said Engineer, or his assistant, at the cost and expense of the contractor.

The contractor further covenants and agrees that he will well and truly pay all laborers, mechanics, subcontractors and material men who perform work or furnish material under this contract, and all persons who shall supply him and or the subcontractors with provisions, provender and supplies for the carrying on of the work. [82]

The contractor further covenants and agrees that he will begin the actual performance of the work required and contemplated under this agreement within ten days after the date of the execution of this contract and that all and every of the said materials shall be furnished and delivered and all and every of the said labor shall be done and performed in every respect to the satisfaction and approval of the engineer aforesaid on or before APRIL 30, 1935. It is expressly understood and agreed that in case of the failure on the part of the contractor, for any reason, except with the written consent of the State Highway Commission, to complete the furnishing and delivery of the said material and the doing and performance of said work on or before APRIL 30, 1935, the party of the first part shall have the right to deduct from any moneys due the contractor, or if no moneys shall be due, the party of the first part shall have the right to

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

recover the amount of Twenty-five and no/100 Dollars (\$25.00) per day, as fixed, agreed and liquidated damages, for each and every calendar day elapsing between the date above stipulated for completion and the actual date of completion and final acceptance; this in accordance with the paragraph of the Standard Specifications hereto annexed which refers to "Failure to Complete the Work on Time." Provided, however, that upon receipt of written notice from the contractor of the existence of causes over which said contractor has no control and which must delay the completion of the said work, the State Highway Commission may, at its discretion, extend the period hereinbefore specified for the completion of the said work, and in such case the contractor shall become liable for said liquidated damages for delays commencing from the date on which said extended period shall expire. [83]

The contractor further covenants and agrees that he will without further expense to the party of the first part, remove all surplus soil and rubbish from off the said land and leave the said road and parts of the land or field adjoining it affected by such work, in the proper state, order and condition.

It is expressly understood and agreed that if the contractor fails to comply with any of the requirements of the plans or specifications, or shall discontinue the prosecution of the work, or if the con-

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

tractor shall become insolvent or bankrupt, or commit any act of bankruptcy or insolvency, or allow any final judgment to stand against him unsatisfied for a period of forty-eight (48) hours, or shall make an assignment for the benefit of creditors, or from any other cause whatsoever shall not carry on the work in an acceptable manner, the Engineer shall give notice in writing to the contractor and his surety of such delay, neglect or default, specifying the same, and if the contractor within a period of three (3) days after such notice shall not proceed in accordance therewith, then the Commission shall, upon written certificate from the Engineer of the fact of such delay, neglect or default and the contractor's failure to comply with such notice, have full power and authority, without violating the contract, to take the prosecution of the work out of the hands of said contractor, to appropriate or use any or all materials and equipment on the ground as may be suitable and acceptable and may enter into an agreement with any other person or persons for the completion of said contract according to the terms and provisions thereof, or use such other methods as it may deem expedient for the completion of said contract in the specified manner. All costs and charges incurred by the Commission, together with the costs of completing the [84] work under contract, shall be deducted from any moneys due or which may become due said contractor. In case the

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

expense so incurred by the Commission shall be less than the sum which would have been payable under the contract, if it had been completed by said contractor, then the said contractor shall be entitled to receive the difference; and in case such expense shall exceed the sum which would have been payable under the contract, then the contractor and the surety shall be liable and shall pay to the state the amount of said excess.

It is expressly understood and agreed that no claim for extra work or materials, not specifically herein provided, done or furnished by the contractor, will be allowed by the State Highway Commission, nor shall the contractor do any work or furnish any materials not covered by these specifications and contract unless such work is ordered in writing by the Engineer. In no event shall the contractor incur any liability by reason of any verbal directions or instructions that he may be given by the said engineer, or his authorized assistant; nor will the said party of the first part be liable for any extra materials furnished or used, or for any extra work or labor done, unless said materials, work or labor are required by said contractor on written order furnished by the said engineer. Any such extra work or materials which may be done or furnished by the contractor without such written order first being given shall be at said contractor's own risk, cost and expense, and he hereby covenants

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)
and agrees that without such written order he shall make no claim for compensation for work or materials so done or furnished.

The contractor further covenants and agrees that during the progress of the work to be performed under the provisions [85] of this contract, he will in every respect comply with the provisions of the Workmen's Compensation Act, being Chapter 96 of the Session Laws of the 14th Legislative Assembly of the State of Montana, and with all statutory provisions supplementary or amendatory thereto.

In case any question or dispute arises between the parties hereto respecting any matter pertaining to this contract, or any part thereof, said questions or disputes shall be referred to the State Highway Commission and Attorney General of the State of Montana, whose decisions shall be final, binding and conclusive upon all parties without exception or appeal; and all right or rights, of any action at law, or in equity, under and by virtue of this contract, and all matters connected with it and relative thereto are hereby expressly waived by the contractor.

It is expressly understood and agreed that the contractor will notify the State Highway Commission in writing of the date upon which his work will be completed and ready for final inspection; that upon receipt of such notice from the contractor the engineer will arrange for a final inspection of

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

the work, such inspection to be had within fifteen days of the date specified in such notice from the contractor; that final payment for the work will be made within ninety days of the date of the final acceptance of the project by the engineer.

The contractor further agrees that he will save and keep harmless the said State of Montana against and from all losses to it from any cause whatever, including patent trade mark and copy-right infringements in the manner of constructing such section of roadway. [86]

The contractor hereby further agrees to receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution and completion of the whole of the work to be done under this contract or agreement, and in all respects to complete said contract to the satisfaction of the State Highway Commission; it being understood and agreed by and between the parties hereto that ninety per cent (90%) of the amount due for the completion of work during any working month, exclusive of "extra work" and "extra materials," when and only when such amount is in excess of five hundred dollars (\$500.00) shall be paid to the contractor by the party of the first part within thirty days after the expiration of that working month, and all unpaid balances due on the final estimate shall be paid similarly to the contractor within ninety days

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)
after the final acceptance of the contract, as provided in the second paragraph supra; the estimate in all cases of the work completed during any working month as well as the final estimate, to be prepared by the engineer of the State Highway Commission or his authorized assistant.

(Here refer to schedule of bid prices submitted by contractor with his Proposal Form, which schedule and Proposal Form are inserted and, by agreement of both parties, are made a part of the Contract.)

It is expressly understood and agreed by and between the parties hereto that as a condition precedent to the complete execution of this contract, the contractor will furnish a good and sufficient surety bond in the amount of Fifteen thousand six hundred fifteen and 66/100 Dollars (\$15,615.66) to be conditioned upon the faithful performance of the covenants and agreements as herein set forth by him to be performed, subject [87] to the approval by the Chairman of the State Highway Commission and the Attorney General of the State of Montana.

In witness whereof, the Chairman of the State Highway Commission, by authority in him vested, has hereunto subscribed his name on behalf of the State of Montana and affixed the seal of the State Highway Commission, hereto, and the said—Cover-

(Deposition of W. O. Whipps.)

(Plaintiff's Exhibit 1 on Deposition—continued)

dale & Johnson—hereunto set their hands and seal,
the day and year first above written:

STATE OF MONTANA,

By O. S. WARDEN

Chairman of the State High-
way Commission.

[Seal of State Highway Commission]

Attest:

W. O. WHIPPS

Secretary.

[Seal] COVERDALE & JOHNSON

[Seal] By JOHN M. COVERDALE

[Seal] By E. O. JOHNSON

Witnesses: KATHERINE L. COVERDALE
DON W. JACOBUS

Approved as to form and legality:

RAYMOND T. NAGLE

Attorney General.

By C. J. DOUSMAN

Assistant

PLAINTIFF'S EXHIBIT 2 ON DEPOSITION

CONTRACT BOND

(Revised February, 1931)

Know all men by these presents, That we, John
M. Coverdale and E. O. Johnson, a co-partnership,
doing business under the firm name of—Coverdale

(Deposition of W. O. Whipps.)

& Johnson—hereinafter called the “Principal” and United States Fidelity and Guaranty Company, a corporation licensed under the laws of the State of Montana, hereinafter called the “Surety” are held and firmly bound unto the State of Montana in the full and just sum of Fifteen thousand [88] six hundred fifteen and 66/100 Dollars (\$15,615.66) lawful money of the United States of America, to be paid to the State of Montana, or its assigns, to which payment well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our respective seals and dated this Twenty-first day of September, 1934.

Whereas, the above bounden “Principal” has entered into a contract with the State of Montana, by the State Highway Commission, through its Chairman, bearing even date herewith, for the improvement construction of certain section of bridges in Lewis & Clark County, State of Montana, U. S. Public Works Highway Project No. NRH-176 E, U 2 (1935) for approximately the sum of Fifteen thousand six hundred fifteen and 66/100 Dollars (\$15,615.66) the said bridges being situated as follows: 1 concrete and 5 treated timber pile trestle bridges and stock passes on the Augusta-Sun River Road in Lewis & Clark County, and

Whereas, It was one of the conditions of the award of the State Highway Commission, acting for

(Deposition of W. O. Whipps.)

and on behalf of the State of Montana, pursuant to which said contract was entered into, that these presents should be executed:

Now, Therefore, The condition of this obligation is such that if the above bonded "Principal" as Contractor shall in all respects faithfully perform all of the provisions of said contract, and his, their or its obligations thereunder including the specifications therein referred to and made part thereof and such alterations as may be made in said specifications as therein provided for, and shall well and truly, and in a manner [89] satisfactory to the State Highway Commission, complete the work contracted for, and shall save harmless the State of Montana, from any expense incurred through the failure of said Contractor to complete the work as specified, or from any damages growing out of the carelessness of said Contractor or his, their, or its servants, or from any liability for payment of wages due or material furnished said Contractor, and shall well and truly pay all laborers, mechanics, subcontractors and material men who perform work or furnish material under such contract, and all persons who shall supply him or the subcontractor with provisions, provender and supplies for the carrying on of the work, and also shall save and keep harmless the said State of Montana against and from all losses to it from any cause whatever including patent, trade-mark and copyright infringements, in the manner of constructing said section

(Deposition of W. O. Whipps.)
of work, then this obligation to be void or other-
wise to be and remain in full force and virtue.

[Seal] COVERDALE & JOHNSON

[Seal] By JOHN M. COVERDALE

[Seal] By E. O. JOHNSON

Witnesses:

KATHERINE L. COVERDALE

DON W. JACOBUS

UNITED STATES FIDELITY AND
GUARANTY COMPANY

Surety Company

By DON W. JACOBUS

Its Attorney in Fact.

Approved as to form and legality:

RAYMOND T. NAGLE

Attorney General.

by C. J. DOUSMAN [90]

(Deposition of W. O. Whipps.)

Office of the State Auditor
Insurance Department

U. S. Fidelity & Guaranty Co. is duly licensed to do business in the State of Montana.

Don W. Jacobus is a duly licensed Agent for the above named company.

Don W. Jacobus is the duly authorized Attorney-in-Fact with powers to execute bonds for aforesaid Company in unlimited amounts.

JOHN J. HOLMES

State Auditor and

Commissioner of Ins.

By J. D. KELLEY

F. THOMAS

Date 10/1/34

State of Montana,
County of Lewis and Clark—ss.

Don W. Jacobus, being first duly sworn, deposes and says that he is the Manager of the Montana Branch Office of the United States Fidelity and Guaranty Company of Baltimore, residing in Helena, that he as Attorney-in-fact of said surety company has executed the attached bond on behalf of John M. Coverdale and E. O. Johnson, a copartnership, doing business under the firm name of Coverdale & Johnson of Anaconda and Helena, Montana, running to the State of Montana and covering the construction of U. S. Public Works Highway

(Deposition of W. O. Whipps.)

Project NRH-176 "E" Unit 2 (1935); that the full agent's commission on the said bond will be paid by the United States Fidelity and Guaranty Company to a licensed agent of the said United States Fidelity and Guaranty Company and that the bond and premium therefor has been entered upon the books of the Montana Branch Office of the [91] said United States Fidelity and Guaranty Company.

DON W. JACOBUS

Subscribed and sworn to before me this 1st day of October, 1934.

L. ALBRECHT

Notary Public for the State of Montana.
Residing at Helena, Montana.

My commission expires December 15th, 1934.

The Witness: The documents, plaintiff's exhibits 1 and 2, are not the only documents of that character in connection with any contract between Coverdale and Johnson and the State Highway Commission which I have in the official files and records of the commission as I think they had another contract, but not on this project. This contract is a contract connected with a U. S. Public Works Highway Project in the State of Montana known as Project NRH-176 "E", Unit 2 (1935).

After plaintiff's exhibit 1 was signed in duplicate, one original was delivered to the contractor

(Deposition of W. O. Whipps.)

and the other kept by the State Highway Commission.

Q. Upon delivering of the contract to the contractor does, or did the Commission at the time the present contract bears date, require any evidence of the issuance of a public liability policy applicable to the work embraced in that contract?

Mr. Boone: Objected to as leading; on the further grounds as incompetent, irrelevant and immaterial, and calls for a conclusion of the witness, and on the further ground that the contract document speaks for itself and is the best evidence.

The Court: I will overrule the objection.

A. Yes.

Q. What did the Commission require at that time in the way of a written communication showing the issuance of such a [92] policy?

Mr. Boone: Objected to as immaterial, no proper foundation having been laid; there being no showing there was any transaction between the State Highway Commission and the defendant in this action, and in this the requirements of the State Highway Commission will not be binding upon the defendant.

The Court: I will overrule the question.

Q. What?

Mr. Boone: Same objection as to question as amended.

The Court: I will overrule objection.

(Deposition of W. O. Whipps.)

A. The standard specifications attached to a form, a part of the contract, include RO 7.11, require the contractor to carry public liability insurance in the amount of at least Ten Thousand Dollars for one person, and a total of Twenty Thousand for one action. At the time that the contract was sent to Coverdale and Johnson for execution a letter was written transmitting said contract and reminding the contractor of Article 7.11 requesting that the Highway Commission be informed of the fact that the required public liability insurance policy will be obtained.

Mr. Boone: Defendant moves to strike out the answer of the witness on the ground that it is not responsive, and on the further ground that the contract document introduced as plaintiff's exhibit 1 speaks for itself, and on the further ground that any communications between the State Highway Commission and Coverdale and Johnson, the contracting party, are not binding upon the defendant in this action.

Mr. McCabe: The purpose of this line of examination is to show what particular kind of evidence they request, and to show that it was furnished at the request of the defendant [93] company.

Mr. Toole: I do think that in view of counsel's statement the defense should make a statement. As to these documents in these depositions, there have been two references made. One to the bond, and another to an insurance policy, without discrimina-

(Deposition of W. O. Whipps.)

tion or distinction. The bond referred to is the completion bond of the contractor. I don't think your Honor, when you read the pleadings, will be able to determine perhaps whether counsel relies upon his right to recover under the completion bond, and completion of the job, or the public liability insurance policy. I want to state to the Court that it is true that the contract contains the clause referred to by the plaintiff in this action. It contains the clause which requires in the specifications that the contractor shall furnish a public liability insurance policy. It is quite different and distinct from the completion bond. It does not say, however, as to what the terms of that policy shall be. Plaintiff in this action has alleged that the public liability policy was furnished, and the pleadings in this case go upon the theory that the contract between the State Highway Commission and Coverdale and Johnson must be construed together with the public liability policy, and the defense in this action is that is not the law. That is why this objection was made. The provisions of the statute must be construed together with the contract, so that your Honor will understand, there is no law as we view it which requires the Court to construe the contract between Coverdale and Johnson and the State Highway Commission jointly, and together with the public liability policy, but that the policy will stand upon its own terms, and that any evidence of any kind offered for the purpose of altering the contract

(Deposition of W. O. Whipps.)

is a [94] proposal to vary the terms of a written contract by parole evidence, without having shown that it was ambiguous or without having laid a foundation for the receipt of it.

The Court: Well, you may develop your theory. Go ahead. What was that objection now?

Mr. McCabe: "At the time that the contract was sent to Coverdale & Johnson for execution a letter was written transmitting said contract and reminding the contractor of Article 7.11 requesting that the Highway Commission be informed of the fact that the required public liability insurance policy will be obtained."

Mr. Boone: Defendant moves to strike out the answer of the witness on the ground that it is not responsive, and on the further ground that the contract document introduced as plaintiff's exhibit 1 speaks for itself, and on the further ground that any communications between the State Highway Commission and Coverdale & Johnson, the contracting party, are not binding upon the defendant in this action.

The Court: It may not be binding upon the defendant in this action, but it is illustrative, and it may have a bearing on the issues in the case. I will overrule the objection.

The Witness: One of my official duties during the months of September to December, inclusive, 1934, was the handling of correspondence and writing letters on behalf of the Commission and

(Deposition of W. O. Whipps.)

when plaintiff's exhibit 1 was sent to Coverdale & Johnson by mail, a letter from me as Secretary or Administrative Engineer of the Commission accompanied it. The original letter was never returned to the Commission by Coverdale & Johnson. Being shown a document marked plaintiff's exhibit 3, I am able to identify it as a carbon copy of the letter sent to Coverdale & Johnson [95] accompanying the contract and it is one of the official records of the State Highway Commission.

Mr. McCabe: Plaintiff's exhibit No. 3 is offered in evidence.

Mr. Boone: To which the defendant objects on the ground that it is incompetent, irrelevant and immaterial; that the exhibit constitutes a self-serving declaration and on the further ground that no communications, such as plaintiff's exhibit 3, between State Highway Commission and Coverdale & Johnson are binding upon the defendant, and upon the further ground no proper foundation has been laid for the introduction of the exhibit.

The Court: Overrule the objection.

Thereupon plaintiff's exhibit 3, on deposition, was received in evidence over the objection of the defendant and was filed with the Clerk of the Court and said exhibit is as follows:

(Deposition of W. O. Whipps.)

PLAINTIFF'S EXHIBIT 3 ON DEPOSITION

September 26, 1934

USPWH Projects NRH-176 E, U 2 (1935)
and NRH-275 A, Unit 2 (1935)

Coverdale & Johnson,
c/o John M. Coverdale,
416 West Park Avenue,
Anaconda, Montana.

Gentlemen:

There are enclosed herewith two original numbers and two copies of your contracts for U. S. Public Works Highway Projects NRH-176 E, Unit 2 (1935) and NRH-275-A, Unit 2 (1935). In connection with each contract, please have the two originals of the contract and contract bond executed by both members of your firm, signing on the lines checked and having your signature witnessed by two persons. In each case, have the two originals of the [96] contract bond executed by your surety company. Then return the two originals for each project to this office for execution by the Chairman of the Highway Commission. Your original numbers will be returned to you after final execution and approval.

In furnishing your surety bonds, the requirement set forth in Paragraph 3.4, page 4, of the Standard Specifications included in these contracts must be fully complied with, and the certificate referred to

(Deposition of W. O. Whipps.)

must be attached to the Highway Commission's original copy of the bond, which bond is bound in at the back of the contracts.

The copy of the contract marked for the contractor in each case is being furnished in accordance with Article 5.5 of the Standard Specifications. In conformity with this Article, it is expected that the contractor shall keep this copy continuously on the job. The second copy of the contract for each project is intended for the files of your bonding company.

You are reminded of the clause, which is included in Article 7.11, Page 11, Section 7 of the Standard Specifications, providing that you shall carry public liability insurance. The Commission has ruled that no payment on account of these contracts will be made until this office has been furnished with satisfactory information to the effect that this insurance has been taken out by you. Preferably, this information should be conveyed in the form of a letter to this department from the insurance agent who furnishes you the policy. Until this provision is complied with no payment can be made under the contracts.

Very truly yours,

STATE HIGHWAY COMMISSION

By W. O. WHIPPS

Administrative Engineer

W-mo

Encls. [97]

(Deposition of W. O. Whipps.)

The Witness: Being asked to examine the document, marked plaintiff's exhibit 4, I am able to identify it as one of the official records of the Montana Highway Commission which was delivered to the Commission by an agent of the company. I am also able to identify the signature of L. K. Albrecht thereon. L. K. Albrecht is the Assistant Manager under Don W. Jacobus, Manager of the United States Fidelity and Guaranty Company in the Helena Branch office. The red pencil marks in writing and figures thereon were not on the document when it was received by the Commission but were put on at the time of its receipt. These red pencil marks show that the document was received October 1, 1934, and was checked as having been noted by me through the placing of my initials thereon and that said document was marked filed by me, all in accordance with the practice in the office of the State Highway Commission.

As Secretary of the State Highway Commission I have had dealings and communications back and forth with the United States Fidelity and Guaranty Company through Don W. Jacobus, Manager, and L. K. Albrecht, Assistant Manager.

Mr. McCabe: Plaintiff's exhibit 4 is offered in evidence.

Mr. Boone: This is objected to on the ground the instrument has not been properly authenticated; on the further ground no proper foundation has been laid for the admission of the exhibit in evi-

(Deposition of W. O. Whipps.)

dence and on the further ground it is incompetent, irrelevant and immaterial, not serving or having any bearing on the issues in this case.

The Court: Objection overruled.

Thereupon plaintiff's exhibit No. 4, on deposition, was received in evidence over the objection of the defendant and was filed with the Clerk of the Court and said exhibit is as [98] follows:

PLAINTIFF'S EXHIBIT 4 ON DEPOSITION

United States Fidelity and Guaranty Company
Helena Branch Office

In Replying to this Letter Telephone 243
Please Refer to File No.....

Don W. Jacobus, Manager
Suite 27, Union Bank Building
Helena, Mont.

Received 10/1/34
WOW-10/1
Oct. 1, 1934

Attention: Mr. Whipps
Montana State Highway Commission
Helena, Montana

Dear Sir:

Re: Coverdale & Johnson—NRH-275 "A"
Unit 2—\$5,270.32
Coverdale & Johnson—NRH-176 "E"
Unit 2—\$15,115.66

I have executed and herewith enclose bonds covering the above captioned contracts.

(Deposition of W. O. Whipps.)

For your information, wish to advise that we have issued Contractor's Public Liability Policy PC-19715 for this assured, with Public Liability limits Ten Thousand and Twenty Thousand and Property Damage One Thousand. This policy is written for one year from October 1st, 1934.

Yours very truly,

DON W. JACOBUS

Manager

By (s) L. K. ALBRECHT

Assistant Manager

LA:C

Q. Mr. Whipps, do you know whether the Contractor's Public Liability Policy referred to in the writing plaintiff's exhibit 4 was ever delivered to the State Highway Commission? [99]

A. Yes.

Q. Was such policy ever delivered to the State Highway Commission?

Mr. Boone: Objected to as incompetent, irrelevant and immaterial and leading.

The Court: Objection overruled.

A. No.

Q. Are you able to say whether or not a copy of the Contractor's Public Liability Policy mentioned in plaintiff's exhibit 4 was ever delivered to the State Highway Commission? A. Yes.

Q. Was a copy of such policy ever delivered to the State Highway Commission?

(Deposition of W. O. Whipps.)

Mr. Boone: Same objection.

The Court: Same ruling.

A. No.

Cross Examination

By Mr. Boone:

The Witness: As a matter of fact the State Highway Commission has never required of any contractor on any project to deliver to the Commission either the original policy or a copy and that was true in the case of the contract between the State Highway Commission and Coverdale & Johnson. It has never been the requirement of the State Highway Commission that any contractor, including Coverdale & Johnson, deliver to the Commission the original policy taken out or a copy of the policy of insurance.

I have been Secretary and Administrative Engineer of the State Highway Commission since 1925 and in that capacity I am familiar with the various contracts entered into between the [100] State Highway Commission and various contractors for construction projects in the State of Montana. My attention being called to paragraph 7.11 of the Standard Specifications of the contract between the State Highway Commission and Coverdale & Johnson, and particularly to the second part of that paragraph, I will say that that provision has been a standard provision in all contracts between the State Highway Commission and various contractors since 1929. The State Highway Commission, since

(Deposition of W. O. Whipps.)

1929, has never prepared or had prepared a form of Public Liability Insurance Policy for use by contractors under such contracts and the Commission has never prescribed the terms of the form of such policies to be executed under such standard provision as paragraph 7.11 of the Standard Specifications. The Commission has never prescribed the terms and conditions of such policies except in so far as the Standard Specifications referred to says "Public Liability Insurance."

I have never examined the Contractor's Public Liability Insurance Policy which was executed by the United States Fidelity and Guaranty Company under the terms of this particular contract and I have no knowledge or information as to whether or not such policy is a standard contractor's public liability insurance policy.

Mr. McCabe: That is all of that deposition. Now, the other deposition is the same. I presume it may be stipulated that the objections appearing therein may be considered by the Court on reading the said deposition.

Mr. Toole: It is agreeable to the defendant that it may be so considered, that the rulings may be the same in the second deposition.

The Court: Very well. [101]

Whereupon

HARRY DOHENY,

a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: My name is Harry W. Doheny, residence Augusta, Montana. I resided there in December, 1934. I am familiar with the location of the public highway known as the Augusta-Sun River Highway in Lewis and Clark County, Montana, and I am also familiar, and was in December, 1934, with the public highway known as Augusta-Great Falls Public Highway. The Augusta-Sun River Highway is a part of the Great Falls-Sun River Highway, constituting together the Augusta-Great Falls Public Highway.

In December, 1934, I was the father of Marguerite Doheny and Roberta Doheny. Neither was employed in that month by the State of Montana and neither was then employed by the copartnership of Coverdale & Johnson, consisting of John M. Coverdale and E. O. Johnson. At that time Marguerite Doheny was employed at the Randall Hotel in Augusta. Roberta was not employed at that time; she was living at home.

Cross Examination

By Mr. Toole:

The Witness: The highway I have referred to is the highway that runs from Great Falls out to the

(Testimony of Harry Doheny.)

west towards Augusta. It runs pretty much directly from Great Falls to Augusta—pretty nearly west with winding roads here and there—slight winding roads. It is the main highway between Great Falls and Augusta and is a continuous highway. It is fifty-two miles from Great Falls to Augusta. The town of Simms is located about 25 miles, I think, 24 or 25 miles this side of Augusta, between [102] Augusta and Great Falls. Simms is about 25 miles from Augusta and about the same distance from Great Falls.

I am familiar with the location of the place where Coverdale and Johnson were building their bridges in 1934. They were at various points on that highway. The nearest one, I think, to Augusta was about two miles east from Augusta, toward Great Falls.

Q. That is the bridges were in the vicinity of Augusta, were they?

A. They varied along the road. I don't know just how many bridges they built. I know it extended for some miles down that road.

The Witness: The nearest one was about two miles from Augusta. There is a cross road running up through there that comes from Wolf Creek through Augusta and continues on to Choteau. I do not know whether Coverdale and Johnson were building some bridges on that road too at that time.

(Testimony of Harry Doheny.)

Redirect Examination

By Mr. McCabe:

The Witness: The Great Falls-Augusta road runs just on the side of the town of Simms.

Witness Excused.

Whereupon

MRS. ETHEL M. DOHENY,

a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: My name is Ethel M. Doheny. I am the plaintiff in these two actions now being tried in this Court. I am the same Ethel M. Doheny who was the plaintiff in the two actions instituted by me in the District Court of Cascade County, Montana, [103] against Coverdale and Johnson, as Administratrix of the Estate of Marguerite Doheny and as Administratrix of the Estate of Roberta M. Doheny. I reside in Augusta, Montana, and resided there in the month of December, 1934. In that month I was acquainted with Roberta Doheny and Marguerite Doheny as I was their mother. I retained you to act as my attorney in the trial of those cases in the District Court of Cascade County, Montana, and after those cases went to judgment I authorized you to take steps to collect those judgments. I further authorized you to investigate to determine whether

(Testimony of Ethel M. Doheny.)

there was any public liability insurance written covering the work of Coverdale and Johnson on the public highway between Sun River and Augusta. I also instructed you to obtain payment of the judgment from the United States Fidelity and Guaranty Company. Neither of these judgments nor any part of them which I obtained in the District Court of Cascade County, Montana, the record of which I have introduced in evidence, has ever been paid. I have never assigned these judgments, or either of them, or any part of them, nor have I in any manner transferred or disposed of those judgments.

In December, 1934, Marguerite and Roberta Doheny were living at home. Marguerite was working at that time at the Randall Hotel. Roberta was not employed. At no time during the month of December were Marguerite or Roberta Doheny employed by Coverdale & Johnson, a co-partnership consisting of John M. Coverdale and E. O. Johnson, or by the State of Montana.

Mr. Toole: I have no cross examination of this witness, but while the witness is on the stand, counsel for plaintiff in this action requested us to produce the public liability policy herein issued. At the time the request was made we were unable [104] to do so because it was in the possession of Coverdale. We now have it and we now hand it to counsel. The original public liability policy written by the defendant United States Fidelity and Guaranty Company, which is in issue in this action.

Witness Excused

Whereupon

E. J. McCABE

was sworn as a witness on behalf of the plaintiff and testified as follows:

The Witness: My name is E. J. McCabe. I am the Attorney for the plaintiff Ethel M. Doheny, Administratrix of the Estates of Marguerite Doheny, Deceased, and Roberta Doheny, Deceased, in the present actions being tried. I also represented the same plaintiff in two cases filed and tried, and entered in judgments in the District Court of Cascade County, Montana. In the spring of 1936, I believe it was May, I think May of 1936, as such Attorney, and before instituting these actions, I wrote the United States Fidelity and Guaranty Company a letter requesting that I be furnished with a copy of the public liability insurance written on Coverdale & Johnson in connection with the projects and in connection with the state contract which has been offered and received in evidence. I have attempted to locate that letter in my file, but I don't find it, but it was merely a request for that policy. I have lost the letter. In response to that I received a letter which is marked defendant's exhibit No. 26. This was received by me from the postoffice in the United States mail at Great Falls, Montana, and refers to that letter which I had written to them, and in which letter they enclosed a copy of the daily reports.

Mr. Toole: Do you offer it?

(Testimony of E. J. McCabe.)

Mr. McCabe: I now offer it in evidence. [105]

Mr. Toole: Objected to in the first place because counsel has not pleaded that he received, or that he requested the report, the daily report, it is not an issue in this case; it is not material. Upon the face of it it shows that it is secondary evidence, in that it is a photostatic copy. It is a photostatic copy of the policy which is now in counsel's possession, and to introduce this at this time would be to encumber the record, and would not be within the issues or the pleadings. I don't think it is particularly material, your Honor, excepting that it is merely a daily report, and is not the policy which is pleaded in this case. Counsel now has the policy.

The Court: I will let it go in evidence. The objection is overruled.

Thereupon

PLAINTIFF'S EXHIBIT No. 26

was received in evidence over the objection of the defendant, said exhibit being a photostatic copy of the daily report of United States Fidelity and Guaranty Company as to the issuance by said company of Contractors' Public Liability Policy No. PC-19715 and letter attached thereto from Thomas A. Hays, Superintendent Casualty Division United States Fidelity and Guaranty Company, to Mr. E. J. McCabe, Attorney, which letter is as follows:

United States Fidelity and Guaranty Company
Baltimore, Maryland

Claim Department

Hugh D. Combs

Vice President

August 4, 1937

Casualty Division

Thomas A. Hays

Superintendent [106]

Mr. E. J. McCabe, Atty.

Strain Building

Great Falls, Montana

Re: Coverdale and Johnson

Dear Sir:

In reply to your letter of July 31, you are advised that it is not possible for us to give you an exact copy of the policy which was issued in this case. The original should be in the possession of Coverdale and Johnson to whom it was issued.

We have, however, the daily report and copies of the nine endorsements which are attached to said daily report. In order to comply with your request as far as possible, we are attaching photostatic copies of both sides of said daily report and endorsements. The daily report should contain all the information set forth on the policy.

We assume you have been unsuccessful in your request to Coverdale and Johnson for a copy of the policy itself. We are always loath, for the reasons stated in our communication of July 29, to furnish copies to third parties. Because we do not see how

(Testimony of E. J. McCabe.)

we would prejudice the interest of our insured in this case, we are complying with your request.

Yours very truly,

THOS. A. HAYS

Superintendent

TAH:LWK

Witness (Continuing): After the trial of the action in the District Court in Cascade County, Montana, the two actions to which I have referred, and when the jury went out to consider of their verdict, I spoke to Mr. Coverdale, John M. Coverdale, who is present in Court, and in connection with the cases, and he said,— [107]

Mr. Toole: We object to any statement made by Mr. Coverdale as not a part of this action. He cannot make any statements which could be binding upon the defendant.

The Court: He may answer.

Witness (Continuing): Mr. Coverdale stated, if you obtain any judgment in these cases I have not any money to pay. They won't be any good. I have no money to pay them with.

Mr. Toole: That is all objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Witness (Continuing): After he made certain statements, I said to him, well, cannot I examine the public liability policy that was issued under

(Testimony of E. J. McCabe.)

your contract with the Highway Commission. He said, I don't have it, it is lost, but I will go back to Anaconda, and when I get there, if I can find it, I will sent it to you, or a copy. After that I never heard anything from Mr. Coverdale. So after the judgments obtained in the state court were affirmed by the Supreme Court I talked with Don W. Jacobus, the Manager of the United States Fidelity and Guaranty Company at Helena, in his office. I believe it was in the Union Bank & Trust Company Building in Helena. At that time I stated that I represented Mrs. Doheny and requested that his company pay the judgments obtained in the state court and which had been affirmed by the Supreme Court of the State of Montana. He thereupon said, in reply, we will not pay a cent on the judgments.

Mr. Toole: Now, we move that that be stricken as it not having been shown that Don W. Jacobus has any right of any kind or character to bind the United States Fidelity and Guaranty Company, because he could not refuse under any circumstances to pay claims that the company was properly obligated to pay. [108]

The Court: Was he the Manager of the Company in Montana?

Mr. Toole: I further object on the ground that it has not been shown that he was qualified; that he was qualified to make any statement to vary the terms of a written contract.

(Testimony of E. J. McCabe.)

The Court: I will let the witness answer as to what the Manager said.

A. I went to the office, and on the door of the office was United States Fidelity and Guaranty Company, and printed on it Don W. Jacobus, Manager. That was on the office, on the glass. I went into that office. I asked for the Manager, and Mr. Jacobus, whom I have known for a number of years, appeared and said, what do you want? I requested that he pay the judgments. He thereupon stated, we will not pay another cent on those. Our Attorneys conducted the defense in the state court; we had to pay them, and we had to pay the expenses of the defense of the case in the state court, and also on appeal.

Mr. Toole: I move that all that be stricken as immaterial; not binding upon the United States Fidelity and Guaranty Company.

The Court: I think it is material. I intend to let you state what he said with reference to showing his attitude as far as he represented the company, the attitude of the company, so far as he went in respect to paying these claims. Whether he paid the other expenses or not.

Mr. Toole: Note an exception.

Witness (Continuing): I, as Attorney for the plaintiff, obtained the issuance of the executions that were issued in the two cases which have been introduced as exhibits in this hearing, and personally presented them to the Sheriff of Deer Lodge

(Testimony of E. J. McCabe.)

County, at Anaconda, requesting him to execute the judgments against the property of Coverdale & Johnson, co-partnership, [109] and John M. Coverdale.

Cross Examination

By Mr. Toole:

The Witness: I have not looked at the policy that you just gave me. What I would not like to have done here is to have the policy introduced. I don't think it is any use to introduce it. You have admitted the issuance of the policy. We have introduced the policy that was given to us. It is up to you to introduce the policy. We are not relying upon the policy. We are relying upon the obligation of the company, that the company assumed both under its bond and under the contract, or under any policy that has been written. In other words, they have refused to give us access to the policy. I know as a matter of fact that it is the practice when a public liability policy is issued, that it is delivered by the company to the assured. And I know that in this case, by being informed by Coverdale, a public liability policy issued by the United States Fidelity and Guaranty Company was delivered to Coverdale & Johnson. I think I learned that while the Coverdale cases were being tried. I don't recall whether I had written you a letter discussing this policy prior to the time of the trial of those cases. I did find at the time of the trial that there was a policy and I knew that that policy

(Testimony of E. J. McCabe.)

was delivered to Coverdale. I addressed Coverdale upon the subject and he said he lost it and that he would look for it when he got home, if he could find it. Afterwards I never asked him about it but I had asked you as I knew you were Coverdale's Attorney. As a matter of fact I know that you and Mr. Boone appeared on behalf of Mr. Coverdale, this partnership, in the lower court. [110]

When I first wrote to the United States Fidelity and Guaranty Company they did not reply that they didn't have a policy—on the contrary the first reply was that they would not furnish that. I then wrote back and told them we would compel them to produce it under the laws of the State of Montana under an order of court. It was then that they said they didn't have the policy, or didn't know where it was, and they sent me the daily report. I do not know whether the policy which you have in your hand had been in Coverdale's possession all this time. I was told by the United States Fidelity and Guaranty Company that it did not have the policy. When I received the photostatic copies which were offered in evidence, they said in their letter that those were copies from their files of their daily report, or their information upon this policy.

Q. I am just handing you the policy itself. Just look at it will you? Are you able to tell me from an examination of that policy whether or not it is the public liability policy furnished by the United

(Testimony of E. J. McCabe.)

States Fidelity and Guaranty Company to Coverdale & Johnson? A. No, I can't.

Q. Take the daily report—

The Court: I think you ought to give him an opportunity to examine the policy—not spring it on him and expect him to analyze it, and digest it, and tell us what it is.

The Witness: I can take the photostatic copies and make the comparison at recess. I wrote that letter that I have on July 21, 1937, and got an answer on August 4, 1937, and it was at that time that I received from the United States Fidelity and Guaranty Company what information it had in respect to the policy. [111]

It was the day of the trial in the district court, after the jury had gone out, that I talked with Coverdale in my attempt to get a copy of the policy from him. I did not later communicate with Mr. Coverdale and ask him for the policy but I communicated with you and talked with you about it. You didn't tell me that you did not have it but you said you would try to get it from him, if he had it, that you would write me. I remember you told me that Coverdale had the policy, if anyone had it.

Whereupon a recess was had.

(Testimony of E. J. McCabe.)

After recess.

Cross Examination

Mr. McCabe

Continued:

The Witness: I have had time to examine the policy and the daily report. I find they are substantially the same. I find a difference in the form in that in the daily report there is no signature of the man by the name of Bowman that appears on the policy. I do not know whether Bowman would likely be the local agent who wrote the policy.

Witness Excused.

Plaintiff Rests

Defendant's Case

Whereupon

JOHN M. COVERDALE,

a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: My name is John M. Coverdale. I was a member of the partnership of Coverdale & Johnson. We had a contract, which has been testified to here, for the construction of some bridges near Augusta in 1934. We had two contracts, both

(Testimony of John M. Coverdale.)

with [112] the Montana State Highway Commission. As to the contract for the construction of bridges on the Augusta-Sun River road, and as to the location of the bridges with respect to the town of Augusta, there was one bridge twelve miles on the other side of Simms, where the accident happened, and the furthest bridge is twenty-two miles from Simms.

The closest of the bridges to the town of Simms was twelve miles from Simms and the other bridges were scattered from that twelve mile point to twenty-two miles distant. There were five structures in that one contract and the closest bridge to the town of Simms was located twelve miles from Simms. I recall when the accident happened and at the time this accident happened all of those bridges were completed but the one over the Sun River—the concrete bridge—it was not completed at the time. That bridge is twenty-two miles from Simms. Coverdale & Johnson were not working or operating on that bridge at the time of the accident. At the time of the accident we were operating on the Augusta-Choteau road on the canal—large government canal—that was the bridge we were working on. That was twenty-eight miles from the town of Simms. At the time that this accident happened the closest operation that Coverdale & Johnson had was on the canal—that would be twenty-eight miles from the town of Simms. At that time we were not working

(Testimony of John M. Coverdale.)

at all at any point closer than twenty-eight miles from Simms.

I am familiar with the location of the City of Great Falls and the town of Simms and the town of Augusta, from the place where our work was being carried on. There is a highway leading from Great Falls out to Simms, to Augusta and to the vicinity of our work. Such highway was there at the time of the accident; it has been improved since but I had nothing to do with the [113] improving of that. The firm of Coverdale & Johnson was not carrying on any work in the vicinity of Simms at the time of the accident. The accident occurred on the side of the main traveled highway.

We had a public liability policy covering our operation at that time. Being handed a document, marked defendant's exhibit 27, I think it is the policy which I gave to Mr. Boone about a month ago and I am sure that it is the policy we were carrying at the time Coverdale & Johnson were working on construction of those bridges under those contracts.

Mr. Toole: Now, we offer defendant's exhibit No. 27 in evidence.

Mr. McCabe: No objection.

The Court: It may be received in evidence.

Whereupon defendant's exhibit No. 27 was received in evidence, without objection, and filed with the Clerk of the Court and the material portions of which are as follows:

(Testimony of John M. Coverdale.)

DEFENDANT'S EXHIBIT 27

United States

No. PC 19715

Fidelity and Guaranty Company

Baltimore, Maryland,

A Stock Company

(Hereinafter Called the Company)

In consideration of the premium and of the statements which are set forth in the Schedule of Statements, does hereby agree with the Assured named in the Schedule of Statements as follows:

Agreements

Insurance Provided

I. To settle and/or defend in the manner hereinafter set forth all claims resulting from liability imposed upon the Assured by law for damages on account of bodily [114] injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered within the policy period defined in Statement 2 by any person or persons other than employees of the Assured, by reason of and during the progress of the work described in Statement 4 at the places named therein and elsewhere, if caused by employees of the Assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places, except driving or using any vehicle or auto-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

mobile or any draught animal or loading or unloading any such vehicle.

Defense

II. To defend in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered by any person or persons other than employees of the Assured.

Expense

III. To pay, irrespective of the limit of liability provided for in Item 3 of the Statements hereof, the expenses (including as a part thereof the cost of such immediate surgical relief as is imperative at the time of the accident, court costs, all premiums on release-of-attachment and/or appeal bonds required in any such proceedings, and all interest accruing after entry of judgment for any part of which the Company is liable hereunder and up to the date of payment, tender or deposit in court by the Company of its share of such judgment) incurred by the Company in investigation, negotiation for settlement or defense.

Service

IV. To serve the Assured (1) by inspection of work places specified in the Schedule of Statements

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

whenever deemed [115] necessary by the Company, and thereupon to suggest to the Assured such changes and improvements as may operate to reduce the number and severity of injuries (without liability, however, upon the Company for failure so to do); and (2) upon notice of such injuries, by investigation thereof and by such negotiation and/or settlement of resulting claims or suits as may be deemed expedient by the Company.

Limitation of Liability

V. The Company's liability under this policy is limited as expressed in Statement 3 of said Schedule. If there be more than one named in the Schedule of Statements as the Assured, the said limits shall be available to them jointly, but not to more than one of them severally.

The Foregoing Agreements Are
Subject to the Following Conditions:

Exclusions

Condition A.

This policy shall not cover loss from liability for, or any suit based on, injuries or death;

(1) Caused by any person employed by the Assured (a) contrary to law as to age of employment, or (b) under fourteen years of age in any state in which there is no law restricting the age of employment, or by any contract convict laborer.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

(2) Caused to or by any person while in or on any elevator, hoisting device or appliance, or in any elevator well or hoistway, or while entering upon or alighting from any elevator or hoisting device.

(3) Caused by any draught or driving animal or vehicle or automobile owned or used by the Assured or any person employed by the Assured while engaged in the maintenance or use of same elsewhere than upon the insured premises.

(4) Caused by accidents occurring after the final completion of the work performed by the Assured at the place of occurrence of such accidents. [116]

(5) Caused by any aircraft.

(6) Caused by reason of any work sublet by the Assured.

(7) Nor shall this policy cover (a) liability of others assumed by the Assured under any contract or agreement—oral or written. (b) any obligation assumed by the Assured or imposed upon the Assured under any Workmen's Compensation agreement, plan, or law.

Condition AA.

If while this policy is in force there shall be any change in or addition to the classifications of work undertaken by the Assured as set forth in Item 4 of the Schedule of Statements, this policy

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

shall automatically extend to cover such work, and the premium therefor shall be adjusted in accordance with the Company's Manual rates applicable thereto, unless specifically excluded by endorsement. But nothing herein contained shall be construed as extending the policy to cover any location not specified herein; nor shall such automatic extension cover structural iron and steel erection, bridge building, wrecking, caisson work, tunnelling, railroad or subway construction, sewer building or crib work.

Computation of Premium

Condition B.

(1) The Premium is based upon the total remuneration earned during the policy period by all employees of the Assured engaged in connection with the business or work described in and covered by this policy except drivers and chauffeurs, provided such drivers and chauffeurs are not specifically included in the classification of work described in this policy.

(2) If the Assured is a corporation, the entire remuneration of the president, any vice-president, secretary or treasurer shall be subject to premium charge at the rate applicable [117] to the hazard to which such officer is exposed, subject, however, to a maximum individual salary of \$100 a week; and, provided further, that if any such officer per-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

forms the duties of a superintendent, foreman or workman, his entire remuneration, subject to the foregoing limitation, shall be included in the calculation of premium at the highest rate applicable to any duty which he may undertake.

(3) If the Assured be an individual or a co-partnership, the proprietor or partners performing the duties of superintendent, foreman or workman shall be included in the total remuneration earned at the rate of \$2,000 each per annum.

(4) The premium is subject to adjustment at the termination of the policy period when the Assured shall furnish to the Company, for the purpose of said adjustment, a written statement of the exact amount of remuneration earned by the said employees during the period of such adjustment.

(5) If the earned premium computed thereon at the rate or rates specified in the policy exceeds the premium paid, the Assured shall immediately pay the additional amount to the Company; if less, the Company shall return to the Assured the unearned premium; but the Company shall receive or retain not less than the minimum premium provided in Item 4, Schedule of Statements, except in the event of cancellation by the Company.

(6) The Assured shall keep complete and accurate records corresponding with the classifications of risk enumerated in the policy showing the remuneration earned by employees under each such

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

classification, and failure to keep such records shall entitle the Company to apply the highest premium rate provided by the policy to the entire remuneration earned. [118]

(7) The word "remuneration" used in this policy shall include all salaries, wages and other sums paid for regular time, overtime, piece-work, or for allowances and also the cash equivalent of all board, merchandise, store certificates, or any other substitute for cash.

Cancellation of Insurance

Condition C.

This policy may be cancelled either by the Company or the Assured, at any time by not less than five days' written notice to the other stating when cancellation shall be effective. Notice of cancellation sent by mail to the address of the Assured herein given shall be sufficient notice and check of the Company or the Company's authorized agent similarly mailed a sufficient tender of any unearned premium, but no unearned premium shall be payable until the amount of remuneration expended during the period the policy was in force shall have been determined either by a written statement furnished to the Company by the Assured or an examination of the Assured's records as provided in Condition D. If cancelled by the Assured the Company shall be entitled to an earned premium according to the

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

short-rate table printed hereon, and computed on the entire earnings for the period of the policy as indicated by the actual earnings of the Assured's employees during the time the policy shall have been in force. If cancelled by the Company, or by the Assured upon retiring from business, the Company shall be entitled to an earned premium pro rata when determined; in any event when cancelled at the request of the Assured the Company shall retain not less than the minimum premium stated in the policy.

Inspection and Audit

Condition D.

The Company shall be permitted at all reasonable times (a) to inspect the plants, works, machinery, appliances, and premises covered under [119] this policy (b) to examine the Assured's books and records at any time during the policy period and within one year after the end of the policy period for the purpose of determining the actual premium earned while this policy was in force; and the Assured shall, when requested by the Company, furnish the Company with a written statement of the amount of remuneration earned by any of the persons referred to in Condition "B".

Report of Accident

Condition E.

Upon the occurrence of an accident the Assured shall give, as soon as reasonably possible, notice

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

thereof, with the fullest information obtainable, to the Company at its Home Office, or to a duly authorized agent of the Company. If a claim is made on account of such accident, the Assured shall give like notice thereof with fullest particulars. If thereafter a suit is brought against the Assured to enforce such a claim, the Assured shall, as soon as reasonably possible, forward to the Company at its Home Office every summons or other process as soon as same shall be served on him.

Co-Operation

Condition F.

The Assured shall not voluntarily assume any liability, nor incur any expense, other than for such immediate surgical relief as is imperative at the time of an accident, nor settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiations for settlement, or in any legal proceeding; but whenever requested by the Company, and at the Company's expense, the Assured shall aid in securing information and evidence and the attendance of witnesses; and shall cooperate with the Company (except in a pecuniary way) in all matters which the Company deems necessary in the defense of any suit or prosecution of any appeal.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Action Against the Company

Condition G.

No action shall lie against the Company to recover for any loss under this policy [120] unless brought within two years after the amount of such loss is made certain either by judgment against the Assured after the trial of the issue or by agreement between the parties with the written consent of the Company.

Insolvency of Assured

Condition H.

The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss suffered by any person or persons as the result of an accident occurring while this policy is in full force and effect; and in case execution against the Assured is returned unsatisfied in an action brought by the injured or his or her personal representatives in case of death resulting from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person or his or her personal representatives against the Company under the terms of this policy for the amount of the judgment in said action, not exceeding the limits expressed in the policy.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Special Statutes

Condition I.

If the method of serving notice of cancellation or the limit of time for notice of accident or for any legal proceedings herein contained is at variance with such specific statutory provision in relation thereto in force in the state in which the business operations herein described are conducted, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

Subrogation

Condition J.

In case of payment of loss under this policy, the Company shall be subrogated to all interests of the Assured against any person, co-partnership or corporation, and respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall co-operate [121] with the Company to secure the Company such rights.

Other Insurance

Condition K.

If the Assured carries other valid insurance against loss covered by this policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid and collectible insurance.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Assignment

Condition L.

No assignment of interest under this policy shall bind the Company, unless the consent of the Company shall be endorsed hereon as provided in Condition "M". In case of the death, insolvency or bankruptcy of the Assured during the policy period, this policy shall cover for its unexpired term the legal representative of the Assured, provided notice shall be given to the Company at its Home Office in writing within thirty days after the date of such death, insolvency or bankruptcy.

Policy Changes

Condition M.

No changes in the agreements, conditions or statements of this policy or of any subsequent agreement, which may be made a part hereof, shall be valid unless set forth in writing and signed by the President, Vice-President or one of the Secretaries of the Company; nor shall notice to or knowledge of any agent or other person in respect to these matters be notice to the Company, and no agent or other person has any right or authority to waive this provision.

Statements

Condition N.

The statements in items numbered 1 to 8 inclusive in the Schedule of Statements are true, or, if esti-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

mates only, are believed to be true. This Policy is issued upon such statements and in consideration of the provisions of the Policy respecting its premium together with the payment of the premium herein expressed. [122]

Schedule of Statements:

Item 1. Name of Assured John M. Coverdale and E. O. Johnson, copartnership, doing business under the firm name of

Coverdale & Johnson

P. O. Address Anaconda, Montana

Records of the Assured's books are kept at?

Anaconda, Montana

Individual, Co-Partnership, Corporation, or Estate? Co-partnership

If Individual or Co-Partnership, give full name or names John M. Coverdale, E. O. Johnson

Item 2. The Policy Period (unless sooner terminated by cancellation), shall be from October 1st, 1934, to October 1st, 1935, at twelve and one minute o'clock A. M. standard time at the Assured's address.

Item 3. The Company's liability for an accident, resulting in injuries to or in the death of one person, is limited to Five Thousand Dollars (\$5,000.00) and, subject to the same limit for each person, the Company's liability for an accident, resulting in injuries to or in the death of two or more persons, is limited to Ten Thousand Dollars (\$10,000.00).

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Item 4. A complete description of the work covered by this Policy, the locations of all places where such work is to be done, the estimated remuneration of all employees engaged in such work for the period of this Policy, the premium rate or rates and the estimated premium are as follows:

See Endorsement Attached See Endorsement Attached
[123]

(b) Clerical Office Employees,			
Draughtsmen	No. 8810	Nil	Nil
(c) Outside Salesmen, Collectors			
and Messengers who do not			
deliver merchandise	No. 8742	Nil	Nil
		Deposit Premium	

Minimum Premium for this Policy is \$18.00.
 Estimated Advance Premium \$50.00

Item 5. No explosives are used, allowed or kept at the place named in Statement 4, except those usual to the work covered hereby No exceptions

Item 6. There is no operation of locomotives and/or cars by means of locomotives, except as follows: No exceptions

Item 7. No similar insurance has been declined or cancelled by any Company during the past three years, except as herein stated No exceptions

Item 8. No part of the work is sub-contracted directly or indirectly except as herein stated

No exceptions

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

In Witness Whereof, The United States Fidelity and Guaranty Company has caused this Policy to be signed by its President and its Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative of the Company.

R. HOWARD BLAND

President

W. W. SYMINGTON

Secretary

Countersigned by

JOHN W. BOWMAN

Authorized Representative.

[124]

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

SCHEDULE
SUPPLEMENTARY TO ITEM 3 OF DECLARATIONS

No. 1

Kind of Trade, Business, Profession or Occupation: (Manual Classification)	Division of Operators:	Estimated Payroll of Employees for Policy Term	Manual Premium Rate per \$100 of Employee Payroll	Estimated Advance Premium
Concrete Construction—including foundations, or making, setting up or taking down forms, scaffolds, falsework or concrete distributing apparatus—N. P. D. with "Street or Road Construction"—(excavation, and all work in sewers, tunnels, subways, caissons or coffer-dams to be separately rated).....	NRH-275 "A" Unit #2, being construction of two timber pile bridges on Augusta-Choteau Road, Lewis and Clark County, Montana and NRH-176 "E", Unit #2, being construction of concrete and timber pile bridges Augusta-Sun River Road, Lewis and Clark County, Montana and elsewhere in the State of Montana.	If any	.396	Deposit Premium \$50.00 Quarterly Premium Adjustment
Excavation—for cellars or foundations of buildings, bridges, retaining walls or dams—including rock—no tunneling.....	3470	If any	1.188	
Iron or Steel Erection—bridges.....	5067	If any	.984	
Pile Driving—N. O. C.....	6003	If any	.168	

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Attached to and forming part of Policy No. PC-19715 Issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

Countersigned JOHN W. BOWMAN
Authorized Representative.

[125]

Property Damage Endorsement

No. 2

In consideration of the premium hereinafter provided, the policy to which this endorsement is attached is hereby extended as follows:

1. To indemnify the Assured against loss by reason of the liability imposed upon him by law for damages as respects injury to or destruction of property other than the property owned, leased, occupied, or used by, or in the care, custody or control of the Assured or any of his employes, resulting solely and directly from an accident due to the business operations of the Assured described in Item 2 of this endorsement.

2. This endorsement shall be null and void unless attached to the Public Liability policy of the United States Fidelity and Guaranty Company issued to the Assured, and in force at the date of any accident for which claim is made hereunder, the number of

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

which policy is given at the bottom of this endorsement. This endorsement shall not apply to any of the causes of accidents which are excluded in Condition "A" of the said policy in so far as such exclusions are not inconsistent with the specific undertakings of this endorsement. This endorsement shall not apply to such injury or destruction if due to (a) the ownership, care, maintenance, operation, or use of any elevator or escalator or any aircraft, or any automobile, draft animal, team or other vehicle; (b) the explosion, collapse, or rupture of any boiler or other receptacle under pressure, including parts thereof; (c) the breaking, disrupting, or tearing asunder of any engine, flywheel, or turbine; (d) the breaking, burning out, or disrupting of any electrical power unit; (e) due directly or indirectly to fire; (f) the discharge, leakage or precipitation of water or [126] steam from automatic sprinkler systems, plumbing systems, tanks, steam or hot water heating pipes or radiators, elevator tanks or cylinders, stand pipes for fire hose; and rain or snow admitted to the interior of buildings by defective roofs, leaders or spouting, or through broken or open windows or skylights, at or from premises owned, leased or rented by the Assured; (g) the collapse of or structural injury to any building or structure adjacent to the insured premises due to the removal of other buildings, structures or supports; or due to excavation below the natural sur-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

face of the ground, or to blasting therein or thereon; (h) explosions of every character not here before excluded.

3. Agreements 1, 2, 3, and 4 of said policy, in so far as their provisions are not inconsistent with this endorsement, are hereby made a part of the obligations of the Company as fully and completely as though wholly written or printed herein, it being understood that the injuries therein referred to shall, for the purpose of this endorsement, be construed as injury to or destruction of property as hereinbefore described and defined.

4. All the terms, conditions, and requirements expressed in said policy of the United States Fidelity and Guaranty Company, including those contained in the Schedule of Statements forming part thereof, so far as the same are not inconsistent with the expressed obligations of this endorsement, are hereby made a part of this endorsement as fully and completely as though written or printed herein; it being further understood and agreed that this endorsement covers only the operations at the locations specifically described in Item 2 of the Schedule of Statements. [127]

5. The estimated advance premium for this endorsement is computed by applying such rates as are stated in Item 2 of said schedule to the premium basis stated in Item 4 of the Schedule of Statements in said policy. Such premium basis and the result-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

ing premium are subject to adjustment as in said policy provided.

6. This endorsement may be cancelled without effect upon the policy to which it is attached in the same manner in which said policy can be cancelled, but cancellation of said policy shall operate as a cancellation of this endorsement as of the same date without notice. In the event of cancellation the requirements of said policy respecting its Minimum Premium shall apply to the Minimum Premium for this endorsement.

7. The Company's limit of liability under this endorsement on account of any one accident resulting in injury to or destruction of the property of one or more persons, shall be the actual value of the property injured or destroyed at the time of such injury or destruction, together with the loss of use thereof, but in no event in excess of the total sum of One Thousand and 00/100—Dollars.

Schedule of Statements

Item 1. This endorsement is to become effective October 1st, 1934, 12:01 o'clock A. M. Standard Time. The period between the effective date of this endorsement and the expiration of said policy is herein called the endorsement period.

Item 2. The premium rates stated below are applied to the same premium basis as is used in said policy for computing premium. Such premium

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

basis and the resulting premium for this endorsement are subject to adjustment as in said policy provided. [128]

Classification of Operations	Location	Premium Basis	Premium Rates	Premium
Concrete Construction etc.....5213	See Endorsement No. 1 for Location of Operations	If any	.45	Deposit Premium \$50.00
Excavation etc...3460		If any	.75	Quarterly Premium Adjustment
Iron or Steel Erection—bridges5067		If any	.75	
Pile Driving—N. O. C.....6003		If any	.20	

Deposit Premium

Minimum Premium \$15.00 Estimated Advance Premium \$50.00

Attached to and forming part of Policy No. PC-19715 issued by the UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934.

E. ASBURY DAVIS

President

W. W. SYMINGTON

Secretary

Countersigned JOHN W. BOWMAN

Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company
Baltimore, Maryland

Contractors' Public Liability Endorsement

No. 3

In consideration of the premium for the Policy to which this Endorsement is attached, it is hereby understood and agreed as follows:

(A) This policy is extended to cover claims against the Assured for accidental bodily injury arising in connection with:

1. Self-propelled contractors' equipment and appliances (except motorcycles, tractors, and automobiles, whether with or without mounted equipment or mach- [129] inery) with or without towed equipment, while being moved under their own power between places covered by the Policy where the Assured is carrying on his operations;

2. Road graders and road scrapers while being drawn by draught animals between places covered by the Policy where the Assured is carrying on his operations.

(B) Exclusion (3) of Condition A of the Policy is changed to read as follows:

“Caused directly or indirectly by any draught or driving animal, any automobile,

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

trailer, tractor, motorcycle or other vehicle (including the loading and unloading thereof) elsewhere than at the immediate places covered by the Policy where the Assured is carrying on his operations.”

instead of as originally written.

(C) If the Assured is protected by other insurance against loss caused by the ownership, maintenance or use of any draught or driving animal, any automobile, trailer, tractor, motorcycle or other vehicle (including the loading and unloading thereof), which is also covered under the Policy to which this Endorsement is attached, then, with respect to such loss, this Policy shall operate only as Excess Insurance over and above such other insurance, anything in Condition K of the Policy to the contrary notwithstanding.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934.

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, [130] Maryland.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS

President

W. W. SYMINGTON

Secretary

Countersigned JOHN W. BOWMAN

Authorized Representative

United States Fidelity and Guaranty Company
Baltimore, Maryland

Property Damage Limit Endorsement for
Contractors' and Manufacturers' Policies

No. 4

It is understood and agreed that Paragraph No. 7 of the Property Damage Endorsement is hereby expunged and the following substituted in lieu thereof:

The Company's limit of liability under this endorsement for injury to or destruction of the property of one or more persons shall be the actual value of the property injured or destroyed at the time of such injury or destruction, together with the loss of use thereof, but in no event in excess of the sum of \$1,000.00 on account of any one accident and, subject to that limit for each such accident, the Company's total limit of liability for all accidents occur-

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

ring during the policy term shall not exceed \$10,000.00, said total limit of liability shall be successively reduced by the amount of each and every claim paid by the Company.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934 [131]

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland, To Coverdale & Johnson of Anaconda, Montana Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS
President

W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

No. 5

It is Understood and Agreed, That Item #3 of the Schedule of Statements of the undermentioned policy is amended to read as follows:

The Company's liability for an accident resulting in injuries to or in the death of one person is

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

limited to Ten Thousand Dollars (\$10,000.00) and, subject to the same limit for each person, the Company's liability for an accident resulting in injuries to or in the death of two or more persons is limited to Twenty Thousand Dollars (\$20,000.00).

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,
To Coverdale & Johnson of Anaconda, Montana
Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS
President

W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN

Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company

Baltimore, Md.

No. 6

Deposit Premium Endorsement

It Is Hereby Understood and Agreed, That subject in all other respects to the terms and conditions of the undermentioned policy, the Assured shall pay a deposit premium of Fifty and 00/100 Dollars, (\$50.00 P. L.) Fifty and 00/100 Dollars (\$50.00 P. D.) in advance, and shall render, over his signature, at the end of each Three months period a statement of the wages actually expended under said policy; and shall forthwith pay to the Company the premium on such wages at the rates named therein; the deposit premium to be applied on the final premium adjustment under the policy.

Attached to and forming part of Policy No. PC-19715 Issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,

To Coverdale & Johnson of Anaconda, Montana

Dated at Anaconda, Montana this 1st day of October, 1934

R. HOWLAND BLAND

President

W. W. SYMINGTON

Secretary

Countersigned JOHN W. BOWMAN

Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company
Baltimore, Maryland

Endorsement

No. 7

Upon ten days' advance notice by the Assured of any operations as described under Code No. 5067 to be undertaken, giving the exact location and the description of the work and estimate payroll and duration of such work, this policy may be extended to cover such specific work only by the issuance of an endorse- [133] ment by the Company.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms and conditions of this policy, other than as stated above.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached.

This Endorsement is effective as of October 1st, 1934.

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland,
To Coverdale & Johnson of Anaconda, Montana
Dated at Anaconda, Montana this 1st day of October, 1934

E. ASBURY DAVIS
President

W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

United States Fidelity and Guaranty Company
Baltimore, Maryland

Endorsement

No. 8

In Consideration of the premium at which the undermentioned policy is written, it is hereby understood and agreed that said policy is extended to cover operations described under Code No. 5067 set forth in the schedule of operations attached to the undermentioned policy as applicable to that certain work designated as NRH-275 "A" Unit #2, being two timber pile bridges on Augusta-Choteau Road and NRH-176 "E" Unit #2, being concrete and timber pile bridges on Augusts-Sun River Road, Lewis and Clark County, Montana.

Subject otherwise to all the terms, limits and conditions of the policy to which this endorsement is attached. [134]

This Endorsement is effective as of October 1st, 1934.

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, Maryland, To Coverdale & Johnson of Anaconda, Montana Dated at Anaconda, Montana this 1st day of October, 1934.

E. ASBURY DAVIS
President

W. W. SYMINGTON
Secretary

Countersigned JOHN W. BOWMAN
Authorized Representative

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Contractors Service Endorsement

Effective: 2-6-35

Expiration: 10-1-35

No. 9

It is Understood and Agreed that the policy to which this endorsement is attached is issued to cover specific work located at NRH-109 "A", Unit 5, being construction concrete bridge on Witt Hill section U. S. Highway No. 10, Stillwater County, Montana.

For the benefit of the Assured and the Company, it is further understood and agreed that when additional work at other locations is undertaken the Assured will advise the Company of the nature and location of such work, as soon as reasonably possible, in order that the Company may make arrangements for prompt inspection, claim and medical attention necessary to serve the Assured in the most advantageous and economical manner.

Nothing herein contained shall be held to vary, alter, waive or change any of the terms, conditions or limits of this policy other than as stated above.

(Testimony of John M. Coverdale.)

(Defendant's Exhibit 27—continued)

Attached to and forming part of Policy No. PC-19715 issued by the United States Fidelity and Guaranty Company, of Baltimore, [135] Maryland, To Coverdale & Johnson of Anaconda, Montana Dated at Helena, Montana this 6th day of February, 1935.

E. ASBURY DAVIS

President

W. W. SYMINGTON

Secretary

Countersigned L. K. ALBRECHT

Authorized Representative

The Witness: After this accident I consulted an attorney, you, Mr. Toole in Missoula. You were my attorney at the time. You represented me at the trial of those cases and during the period after the accident and clear on through the Supreme Court.

Cross Examination

By Mr. McCabe:

The Witness: I stated that after the accident I employed Toole & Boone to represent me as attorneys. The United States Fidelity and Guaranty Company did not pay any part of the expense or fees for defending the action. I have not paid my attorney's fees yet; I paid some but not all of them.

(Testimony of John M. Coverdale.)

They told me that they were absolutely out of it; they would have nothing to do with it.

My attention being called to the policy introduced here wherein it provides that the "company would defend all actions and proceedings, defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries, including death, at any time resulting therefrom accidentally suffered, or alleged to have been suffered by any person or persons other than employees of the assured," they absolutely said that the policy did not cover that accident. [136]

Being asked if they refused to defend the action, absolutely not, they said they were out of it. I did pick that up—that item you read off there and they said that the policy did not cover any accident from the project to any point from the project, or from any point to the project. Being asked if I notified them of this accident and called their attention to the policy, I said, "We are sued" and that was all there was to it. They wouldn't take it over; they refused to defend.

I do not know whether they paid part of the attorney's fees to Messrs. Toole & Boone in connection with that expense; not that I know of. Mr. Toole gave me a good big bill for it. Mr. Toole didn't tell me that the company had paid some part of these expenses under the policy.

Witness Excused

Whereupon

HOWARD TOOLE

was called and sworn as a witness on behalf of the defendant, and testified as follows:

The Witness: My name is Howard Toole.

Mr. McCabe: I extend the same courtesy to you that you so kindly extended to me. You may testify in narrative form.

Witness (Continuing): I am an attorney, admitted to the bar in Montana; residing in Missoula, and a member of the firm of Toole & Boone. John M. Coverdale prior to the accident had been my client. Shortly after the filing of the complaints which have been introduced in evidence, possibly within three or four days thereafter, Mr. Coverdale came to Missoula and employed me to defend him, or to defend the firm of Coverdale & Johnson in those actions, which I agreed to do and undertook to do. I did defend these actions. Some time about the 16th of April in 1936, I had seen the policy of insurance which has been introduced here, and I knew that Mr. Coverdale had a contractor's [137] public liability insurance policy. I read the policy at about the time when the actions were commenced, and then considerably later, I think it must have been perhaps a year later, it was in April, I think of 1936, I notified the United States Fidelity and Guaranty Company of the pendency of the actions. Called their attention to the defense clause, and in conversation with Mr. Ros-

(Testimony of Howard Toole.)

siter, who is their attorney in charge of their claims department in Montana, I discussed this matter of the defense under that clause, which I think is the first clause in the policy, and at Mr. Rossiter's request I obtained from Mr. Coverdale an agreement which is entitled "Non-Waiver Agreement" dated April 16, 1936, signed by Coverdale & Johnson, by John M. Coverdale, party of the first part, and by W. A. Rossiter of the United States Fidelity and Guaranty Company, as party of the second part. I am able to identify Mr. Coverdale's signature, and Mr. Rossiter's signature, and the agreement has to do with the defense of these actions, and I want first to offer that agreement in evidence.

Mr. McCabe: We have no objection to that.

Whereupon said agreement, defendant's exhibit No. 28, was received in evidence, without objection, and filed with the Clerk of the Court and said exhibit is as follows:

DEFENDANT'S EXHIBIT 28

NON-WAIVER AGREEMENT

It is hereby mutually understood and agreed by and between Coverdale & Johnson, a partnership, the party of the first part, and United States Fidelity & Guaranty Company, the part of the second part, that any action taken by the said party of the second part in investigating an accident which occurred on or about December 11th, 1934, in or near the town of Sims, Montana, [138] result-

(Testimony of Howard Toole.)

ing in the death of Marguerite and Roberta Doheny, in the defense and trial of the actions pending in the District Court of Cascade County entitled "Ethel M. Doheny, as administratrix of the estate of Marguerite Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, a co-partnership, doing business under the firm name and style of Coverdale & Johnson, defendants," and "Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, deceased, plaintiff, vs. John M. Coverdale and E. O. Johnson, a co-partnership, doing business under the firm name and style of Coverdale & Johnson, defendants," arising out of said accident shall not waive or invalidate any of the conditions of the policy of the party of the second part held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

The intent of this agreement is to preserve the rights of the parties hereto and to provide for an investigation of said accident and the trial and defense of said actions above entitled, without regard to the liability of the party of the second part.

Signed in duplicate this 16th day of April, 1936.

COVERDALE & JOHNSON,

By JOHN M. COVERDALE

Party of First Part

UNITED STATES FIDELITY
& GUARANTY COMPANY,

By W. A. ROSSITER

Party of Second Part. [139]

(Testimony of Howard Toole.)

Witness (Continuing): Following the execution of the agreement, and the trial of the cases, I billed Mr. Coverdale for expenses and services rendered, and he didn't pay me all of them, part of it, he paid, I cannot remember how much, and I also billed the United States Fidelity and Guaranty Company for a part of the services rendered, which was paid. They did not pay the full amount of the bill.

Cross Examination

By Mr. McCabe:

The Witness: Prior to December, 1934, I have represented the United States Fidelity and Guaranty Company in specific cases. When this action came to my attention I did not immediately communicate the facts concerning the actions to the United States Fidelity and Guaranty Company. Sometime afterwards I did—at about in April, it must have been considerably over a year after the accident happened, before any communication with the United States Fidelity and Guaranty occurred, as far as I know. It was prior to the trial of the actions in State Court.

I stated that after this bill to Mr. Coverdale for services that the United States Fidelity and Guaranty did not pay the full amount of the bill; they paid part only.

Witness Excused

Whereupon

JOHN M. COVERDALE

was recalled as a witness on behalf of the defendant, and testified as follows:

Direct Examination

By Mr. Toole:

The Witness: Being asked if Mr. McCabe ever asked me for this policy—not that I know of. Mr. McCabe did not ask me for a copy of this policy at the time of the trial of these actions [140] as I never talked to Mr. McCabe—the only words we exchanged, that I know of, were on the witness stand.

Cross Examination

By Mr. McCabe:

The Witness: I do not remember that you went over and spoke to me or that we had a conversation at the side of the table on this side of the jury box after the cases were closed and the jury had gone out to consider of their verdict. I do not remember that we had a conversation at that time—only the questions that you asked me on the witness stand, because I was pretty sore at you. Every time I made a move you pointed your finger at me. I was pretty sore at you. I don't believe I would carry on a conversation with you at that time. I would say we had no conversation at that time.

Witness Excused

Whereupon

W. A. ROSSITER,

a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: I am Claims Attorney for the United States Fidelity and Guaranty Company for the State of Montana. I have been in the employ of the company for twelve years and have been engaged as Claims Attorney for that company for twelve years. I am familiar with the practice of that company since October, 1934, as to the method of writing a contractor's public liability insurance and the records that are kept. The document, plaintiff's exhibit 26, referred to as a daily report and as having been sent to McCabe from Baltimore, is a photostatic copy of regular form daily report.

[141]

When policies are made up, they have the original policy and in it are duplications which are the company records of it and that is what is known as a daily report; it is inside the original policy as the policy is typed up, the duplications from the typewriter go through to the daily report—one is for our records, the branch office, and one is for record in the home office, and the original policy goes to the person to whom the insurance is furnished and the company has nothing left in their records but a

(Testimony of W. A. Rossiter.)

daily report. The company never has an exact duplicate of the original policy.

Being handed the daily report, exhibit 26, and the policy, exhibit 27, I will say that I have not compared them closely but I have glanced through them. Without checking each endorsement on there specifically I would say positively that the daily report is a duplicate copy of the policy provisions and the endorsements are added separately to it and it would have to be checked to see whether one would be missing or be lost. The daily report is a duplicate made right at the time of the original policy.

Mr. McCabe: No cross examination.

Witness Excused

Whereupon

W. T. BOONE,

a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: My name is W. T. Boone. I am an attorney, admitted to the bar in Montana, practicing in Missoula as a member of the firm of Toole & Boone. I have, on two occasions, been over the road from Great Falls to Augusta at the point where these bridges were built under the Coverdale

(Testimony of W. T. Boone.)
& Johnson contract. [142] The first occasion was during the year 1935 while I was investigating the accident which was the subject matter of the two actions in the state court. On that particular trip I drove from Great Falls to Simms on to Augusta, but I did not drive on the road leading from Augusta on towards Choteau. I did not know on that first trip where those bridges were located. I learned this morning where the bridges were located. I was with Mr. Coverdale.

The road from Great Falls to Augusta and the site of the bridges in 1934, at the time of the accident, was an oiled highway from Great Falls to Vaughn; from Vaughn on to Simms the road was a gravelled highway which had been surfaced. That condition of the road continued for a ways past Simms, but a part of the road between Simms and Augusta was under construction, and was a gravelled road, and had not yet been surfaced. The highway from Great Falls to Augusta is a main traveled highway and has a United States designation number and it was such at the time of this accident.

I have checked to see how close the closest bridge constructed by Coverdale & Johnson was and is to the town of Simms where the accident occurred. This morning when we drove to just this side of Augusta, I checked my speedometer reading at the point where the accident occurred and then I checked it at the first bridge that was designated to me by Mr. Coverdale. The distance was 12.3 miles.

(Testimony of W. T. Boone.)

Mr. Coverdale designated this morning to me the only bridge under that contract which had not been completed at the time of the accident. That was a concrete bridge, the only concrete bridge, in what is known as the Augusta-Sun River contract which has been introduced here in evidence. That bridge was 21.4 [143] miles from the point where the accident occurred.

The two bridges on the Choteau road come under a different contract which Coverdale & Johnson had with the State of Montana. The first of those two bridges is a small stock pass bridge which is located 26.6 miles from Simms—the point where the accident occurred. The second bridge was a large bridge across a large canal which was located 1.8 miles farther than the first of the two bridges, and 28.4 miles from the point where the accident occurred.

Mr. McCabe: No cross examination.

Witness Excused

Whereupon

JOHN M. COVERDALE,

a witness recalled on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Toole:

The Witness: At the time when the accident occurred at Simms, Coverdale & Johnson was work-

(Testimony of John M. Coverdale.)

ing on the bridge over the canal on the Augusta-Choteau road. The concrete bridge was unfinished but we were not working on it at that time.

Mr. McCabe: No cross examination.

Witness Excused

Mr. Toole: The defendant rests.

Rebuttal

Whereupon

ETHEL M. DOHENY,

a witness recalled in rebuttal, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: I am the same Ethel M. Doheny who has heretofore testified in this proceeding. I was present at the trial [144] of the two cases in the state court concerning which evidence has been introduced in this case. After the jury went out in those cases I saw you go up and speak with Mr. Coverdale. The gentleman you refer to here in the court room is the one I saw you talking to. I didn't hear the conversation but I knew you were conversing together at the time.

Mr. Toole: No cross examination.

Witness Excused

Whereupon

HARRY DOHENY,

a witness recalled in rebuttal, testified as follows:

Direct Examination

By Mr. McCabe:

The Witness: I am the same Harry Doheny who has heretofore testified in this case. I was present at the trial of the cases of Ethel M. Doheny, administratrix, versus the co-partnership of Coverdale & Johnson in the District Court of Cascade County, Montana, concerning which evidence has been introduced in this case. I was in the court room at the time the jury had retired to consider of their verdict in that case. At that time I saw you approach Mr. John M. Coverdale, the gentleman sitting here. I knew you were speaking to him, but of what nature I did not know. I could tell you were speaking to him and he was speaking to you.

Mr. Toole: No cross examination.

Witness Excused

Mr. McCabe: Plaintiff rests.

Mr. Toole: No sur-rebuttal. [145]

Whereupon the Court announced that after the testimony was written up, the plaintiff would have 30 days after receipt of copy of the testimony in which to file a brief; the defendant to have 30 days thereafter in which to file a brief in answer thereto; and the plaintiff to have 15 days thereafter in which to file a reply brief.

[Endorsed]: Filed Oct. 10, 1940. [146]

Thereafter, on August 29, 1940,

OPINION OF THE COURT

was duly filed herein, being in the words and figures following, towit: [147]

[Title of District Court and Cause.]

The above entitled causes, numbered 69 and 70, were heard together, as the facts are identical and the law applicable thereto the same. The pleadings are alike in both cases.

Judgments were obtained in both causes against the contractors in question, Coverdale and Johnson, co-partners, in the state court, and after affirmation thereof on appeal, executions were issued thereon and subsequently returned to the effect that no property could be found in either case; thereafter this suit was commenced against the above named defendant.

A surety bond was furnished the contractors by defendant in support of a written contract of Coverdale and Johnson with the State of Montana for the performance of work and the furnishing of materials in improving the Augusta-Sun River highway for the sum of \$15,615.66; the contract required the co-partners to furnish a surety bond in that amount on a form provided by the State Highway Commission. In the bond furnished the co-partners were named as principal and the defendant corporation as surety, and it was provided therein, among other things, that the principal would "in all respects faithfully perform all of the

provisions of said contract, and his, their, or its obligations thereunder including the specifications therein referred to and made a part thereof". There was incorporated in the agreement the following requirement: "The contractor shall carry public liability insurance to indemnify the public for injuries or damages [148] sustained by reason of the carrying on the work. This insurance shall be in the amount of at least \$10,000.00 for one person and a total of \$20,000.00 for one accident. The contractor shall submit adequate evidence to the Commission that he has taken out this insurance." Thereafter the defendant notified the Montana Highway Commission by letter that it had executed a bond covering the assured contractors and had issued Public Liability policy of \$10,000.00 and \$20,000.00. This letter seems to have been written following a letter from the Highway Commission to the co-partners calling attention to the public liability insurance requirement of the agreement, and requested a letter from the insurance agent who furnished the policy as the preferable form of evidence of compliance to be submitted to the Highway Commission. The evidence shows that neither the public liability insurance policy nor a copy thereof was ever submitted to the Highway Commission. The agreement in question contains requirements providing that the "agreement" the "Contract Bond" and "any and all supplemental agreements made or to be made are hereby made a part of these specifications and contract and are

to be considered one instrument." The contractors, Coverdale and Johnson, commenced work under their agreement on or about September 25th, 1934 and continued until about February 1st, 1935. On December 10th, 1934, E. O. Johnson, one of the co-partners, and one George Bardon, an employee, drove an automobile to Great Falls, accompanied by the two girls, Marguerite and Roberta Doheny, named in the title, whom they had invited to ride with them. The purpose of the trip to Great Falls was to deliver a two drum hoist which they had been using in performance of the contract and were returning according to their agreement. After delivering the hoist the four persons above named returned in the automobile towards Augusta, the home of the girls and the site where the work under the said contract was being performed. When they arrived near Simms, Montana, Bardon, who was driving for Johnson, turned off the highway and crashed into a tree, in what was alleged to be, a grossly negligent and reckless manner, and as a direct result thereof the two girls received severe injuries from which they later died.

Two actions were commenced in the District Court of Cascade County against the co-partnership. Co-partner Coverdale appeared and defended [149] the actions, claiming in defense that the girls' injuries and death were not the result of negligence in the performance or an act within the scope of the business of the co-partnership. The two cases were consolidated for trial and a verdict and judg-

ment rendered in favor of the administratrix of the estates of the deceased, in each case, for the sum of \$5116.89, and upon appeal both judgments were affirmed; the same administratrix is the plaintiff in the instant cases. Executions on the two judgments were thereafter issued and returned by the Sheriff unsatisfied, and no part of the judgments, or either of them, has ever been paid. Thereafter the administratrix herein made written demands upon defendant, United States Fidelity and Guaranty Company, for payment of the judgments but no payment has ever been made.

In its answer defendant alleged that it had written a public liability insurance policy but that the policy contained an exclusion under which the driving or using of any vehicle or automobile was excepted from the coverage provided in said policy.

As it appears to the court there can be no question that the injuries and death of the two girls occurred in the manner set forth in the complaints and in the course of the carrying on of the work by the co-partners, Coverdale and Johnson, under their agreement with the State Highway Commission. The co-partnership was engaged in performing work under the agreement when the girls were injured. Much has been said about the alleged attempt on the part of defendant to conceal the facts relating to the public liability insurance policy in suit, and in fact the policy itself. Exactly what reason might have actuated the insurer or its representative in not making known the terms of the

policy to the State Highway Commission or the parties to the suit is not fully disclosed. Plaintiffs complain that the original policy was not produced until the trial of the present cases, and that until then they were without definite knowledge of its terms, and because of insurer's attitude in refusing information concerning its terms, they charge the insurer with the exercise of bad faith. In substance the insurer contends that the liability of the defendant company must be determined from the language of the policy without consideration of the agreement and bond pursuant to which the policy [150] was written and premium paid therefor. Plaintiffs contend that in signing the bond and issuing the policy pursuant to the terms of the agreement the defendant agreed to such terms and is bound thereby, and was acting with full knowledge with no waiver of requirements on the part of the Highway Commission, as is apparent from the letter written Coverdale and Johnson by the Highway Commission requiring them to furnish a policy according to the terms of the agreement, and thereafter the defendant by letter notified the Highway Commission it had issued the public liability policy. Although the policy, or a copy thereof, was never submitted to the Highway Commission, the letter from defendant to the Commission was evidently accepted as a statement that the policy conformed to the requirements of the agreement, as the copartners were thereafter allowed to proceed with

their work under their agreement with the Commission.

Plaintiffs rely, among other things, upon the rule that where several instruments are made at the same time in relation to the same subject matter they may be read together as one instrument and the recitals in the one may be limited by reference to the other. This rule may obtain even when the parties are not the same if the several instruments were known to all parties and were delivered at the same time to accomplish an agreed purpose. Here the parties, the State Highway Commission, the copartners and the defendant, were all interested in and familiar with the agreement and specifications and well knew the part to be performed by each to fulfill the specific requirements; one could not partially perform his part and expect to escape responsibility for his failure. There was nothing new or novel about this undertaking, the obligations were known and understood by all the parties and rested upon what appears to have been adequate consideration.

Defendant's counsel have presented able and exhaustive briefs covering the various phases of the case but none of the authorities examined by the court rest upon the same state of facts as are found here, and such differences seem to be material and to distinguish this case from the others relied upon.

The exclusion provisions relied upon by defendant to defeat recovery herein are so antagonistic to the requirements of the agreement, [151] and the

intent and purpose of its terms, as to render them wholly inoperative in the present cases, in the opinion of the court. The defendant as an insurer assumed the burden of protecting members of the public from injury and was paid its premium therefor, and having accepted the benefit should also accept the burden. (Sec. 8750 R. C. M.)

As a precaution and additional security for the protection of members of the public from injury in such a situation as appears to have arisen by reason of the failure of the defendant to do what the letter to the Highway Commission would indicate that it had done, this very comprehensive provision, heretofore referred to, was inserted in the agreement in question: "All things contained herein together with 'advertisement for proposals' or 'notice to contractors' and the contract bond as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these specifications and contract and are to be considered one instrument."

It seems highly probable that the language: "any and all supplemental agreements made or to be made" would include a contract of public liability insurance such as is involved in this controversy, and make it one with the agreement which contained these comprehensive terms, and especially when the defendant and insurer had full knowledge and was in the business of writing such bonds and contracts of insurance, and knew what was expected

and required under the plain and specific language of the agreement, and was paid its price for doing so, and not for inserting exclusion provisions which would render the policy inoperative as to injuries most likely to occur.

It is also contended that the plaintiffs can not recover because the accident occurred some ten or twelve miles from a bridge under construction by the copartners; it appeared in evidence in the state court that the transactions under the contract were extended, or scattered, as the witness Bernstein said, over a distance of ten miles towards Great Falls and five miles towards Augusta. As to this particular question both the state District Court and the Supreme Court apparently found no objection.

Many authorities have been cited to sustain counsel in their [152] respective contentions; some of the following cases appear to have been relied upon by both sides: *Peterson v. Miller Rubber Co.*, 24 F. (2) 59, 8th C. C. A.; *Union Bank & Trust Co. v. Himmelbauer*, 57 Mont. 438, 188 Pac. 940; *Dodd v. Vucovich*, 38 Mont. 188, 99 Pac. 296; *Gary Hay & Grain Co., Inc. v. Carlson*, 79 Mont. 111, 255 Pac. 722; 36 C. J., P. 1062, Sec. 14; *Park Saddle Horse Co. v. Royal Indem. Co.*, 81 Mont. 99, 261 Pac. 880; *Johnson v. Rocky Mountain Fire Insurance Co.*, 70 Mont. 411; *National Surety Co. v. Ulmen*, 68 Fed. (2) 330—the contract here contained no provision requiring the contractor to pay members of the public for injuries, in the present case the opposite is true; *Whittaker v. U. S. Fidelity and Guaranty*

Co., 300 Fed. 129; Secs. 7529, 7531, 7533, 7538, 7545, 10521, R. C. M.

The principles of law found in the authorities and statutory provisions cited seem to favor the plaintiffs. Under the construction given the policy, reading it as one with the agreement and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in either event.

Not all of the specific arguments advanced in the voluminous briefs of counsel for the respective parties have been discussed here since it would result in an unnecessary extension of this opinion and apparently without a corresponding benefit either way, but the court has endeavored carefully to consider and weigh the many different angles of approach by counsel in their efforts to reach a favorable solution of the problems presented as affecting their respective interests. Bearing in mind the facts which appear to have been established, as plaintiffs contend, by a preponderance of the evidence, and the principles of law that ought to control, the court feels justified in the conviction that the plaintiffs ought to prevail in both of these cases, and that judgments should be entered accordingly, and it is so ordered, with costs.

Findings of ultimate facts and conclusions of law may be submitted in accordance with these views.

CHARLES N. PRAY

Judge

[Endorsed]: Filed Aug. 29, 1940. [153]

Thereafter, on September 6, 1940, Findings of Fact and Conclusions of Law were filed in each of said causes, and are in the words and figures following, to-wit: [154]

[Title of District Court and Cause.—No. 69.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause having duly come on for trial on the 26th day of December, 1940, before the Court, Honorable Charles N. Pray, Judge presiding without a jury, the plaintiff appearing in person and by her counsel E. J. McCabe, and the defendant appearing by its counsel, Messrs. Toole and Boone, and oral and documentary evidence having been offered and admitted on behalf of the plaintiff and defendant, and the cause having been submitted to the Court for decision, and the Court having duly considered of the law and the evidence, finds as follows:

FINDINGS OF FACT

I.

That at all times hereinafter mentioned the defendant, United States Fidelity and Guaranty Company, was and still is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do and doing business within the State of Montana.

II.

On or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, appointed Administratrix of the Estate of Roberta Doheny, Deceased, by an order of said court, duly given, made and entered on said date in [155] the matter of the Estate of Roberta Doheny, Deceased, and thereafter letters of administration on the Estate of Roberta Doheny, deceased, were duly issued to plaintiff under the seal of said court and the hand of the Clerk of said court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Roberta Doheny, Deceased.

III.

On or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the pay-

ment to said co-partners by the State of Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars (\$15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of \$15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain written agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all respects of the provisions of said contract by the said co-partners and recited the sum of \$15,615.66 as the penalty thereof.

[156]

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least \$10,000.00 for one person and a total of \$20,000.00 for one accident and

promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of \$10,000.00 for one person and \$20,000.00 for one accident. That plaintiff, prior to the commencement of the above entitled cause, demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty Company, and said co-partners and said defendant failed to furnish either the said policy or a true copy thereof to plaintiff.

V.

That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny and that at the time the said Roberta Doheny was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid

agreement and that thereafter in [157] an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of \$5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant.

VI.

That subsequent to the entry of aforesaid judgment the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest

thereon has been paid and that plaintiff still is the owner and holder of said judgment.

VII.

That thereafter or on about the 17th day of August, 1937, an execution on said judgment was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District Court of Cascade County, on or about the [158] 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and con-

trary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.

IX.

The defendant, United States Fidelity and Guaranty Company retained attorneys and paid in part the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid, under a "non-waiver" agreement in writing and which is in evidence in this action.

X.

On or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is annexed to plaintiff's complaint on file in this action marked "Exhibit A".

XI.

That neither the insurance policy heretofore referred to nor a copy thereof was ever submitted or exhibited to the State of [159] Montana or the Highway Commission of Montana, and no information concerning its provisions was ever given to said State of Montana or said Highway Commission of said State except the notice referred to in above finding of fact IV.

Upon the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW:

I.

That the plaintiff Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, deceased, is entitled to the judgment of the above entitled Court in the above entitled action in her favor and against the defendant United States Fidelity and Guaranty Company in the sum of Five Thousand One Hundred Sixteen Dollars and Eighty-nine Cents (\$5,116.89), together with interest on said sum from May 4, 1936 until paid at the rate of six per centum (6%) per annum, and plaintiff's costs incurred in said action.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Sept. 6, 1940. [160]

[Title of District Court and Cause—No. 70.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause having duly come on for trial on the 26th day of December, 1940, before the Court, Honorable Charles N. Pray, Judge presiding without a jury, the plaintiff appearing in person and by her counsel E. J. McCabe, and the defendant appearing by its counsel, Messrs. Toole and Boone,

and oral and documentary evidence having been offered and admitted on behalf of the plaintiff and defendant, and the cause having been submitted to the Court for decision, and the Court having duly considered of the law and the evidence, finds as follows:

FINDINGS OF FACT:

I.

That at all times hereinafter mentioned the defendant, United States Fidelity and Guaranty Company, was and still is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do and doing business within the State of Montana.

II.

On or about the 8th day of April, 1935, plaintiff was, by an order of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, appointed Administratrix of the Estate of Marguerite Doheny, Deceased, by an order of said Court, duly given, made and entered on said date in [161] the matter of the Estate of Marguerite Doheny, Deceased, and thereafter letters of administration on the Estate of Marguerite Doheny, Deceased, were duly issued to plaintiff under the seal of said Court and the hand of the Clerk of said Court and that at all times since plaintiff has been and still is the duly appointed, qualified and acting administratrix of the Estate of Marguerite Doheny, Deceased.

III.

On or about the 20th day of September, 1934, John M. Coverdale and E. O. Johnson, as co-partners, doing business under the firm name of Coverdale & Johnson, made and entered into a certain written agreement with the State of Montana for the performance by said co-partners of certain work and furnishing certain materials constituting improvements on a public highway known as the "Augusta-Sun River Road" in Lewis and Clark County, Montana, wherein and whereby the said co-partners promised and agreed to perform the work and furnish the materials in accordance with the terms of said contract in consideration of the payment to said co-partners by the State of Montana of the sum of approximately Fifteen Thousand, Six Hundred Fifteen and Sixty-six Hundredths Dollars (\$15,615.66) in accordance with the terms of said agreement. That under the terms of said agreement the said co-partners promised and agreed to furnish a good and sufficient surety bond in the amount of \$15,615.66 to be conditioned for the faithful performance of the covenants and agreements set forth in said agreement and to be by said co-partners performed and thereafter pursuant thereto the said co-partners, as Principal, and said United States Fidelity and Guaranty Company, as Surety, made, entered into and delivered to the State of Montana a certain written agreement designated "Contract Bond" which said agreement was conditioned for the faithful performance in all re-

spects of the provisions of said contract by the said co-partners and recited the sum of \$15,615.66 as the penalty thereof. [162]

IV.

That under the terms and provisions of Paragraph 7.11 of section 7 of said written agreement between the aforesaid co-partners and the State of Montana for the performance of work and furnishing of materials described therein, the said co-partners promised and agreed to carry public liability insurance to indemnify the public for injuries or damages sustained by reason of the carrying on the work in the amount of at least \$10,000.00 for one person and a total of \$20,000.00 for one accident and promised to submit adequate evidence to the State Highway Commission of the State of Montana of taking out such public liability insurance and thereafter as evidence of taking out of said public liability insurance the defendant United States Fidelity and Guaranty Company notified the Montana Highway Commission in writing on or about October 1st, 1934, that said defendant corporation had issued contractors' public liability insurance policy for said co-partners under said contract with a liability of \$10,000.00 for one person and \$20,000.00 for one accident. That plaintiff, prior to the commencement of the above entitled cause, demanded the original or a copy of said public liability insurance policy from the said co-partners and from the defendant, United States Fidelity and Guaranty

Company, and said co-partners and said defendant failed to furnish either the said policy or a true copy thereof to plaintiff.

V.

That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Marguerite Doheny and that at the time the said Marguerite Doheny was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in [163] an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Marguerite Doheny and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of \$5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of

payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant.

VI.

That subsequent to the entry of aforesaid judgment the said co-partners appealed to the Supreme Court of the State of Montana from said judgment and thereafter on the 20th day of May, 1937, the judgment of the aforesaid District Court was affirmed and sustained by the Supreme Court of the State of Montana and remittitur on said judgment was issued by the Supreme Court to the aforesaid District Court and thereafter filed in said District Court on the 5th day of June, 1937. That neither said judgment nor any part thereof nor the interest thereon has been paid and that plaintiff still is the owner and holder of said judgment.

VII.

That thereafter on or about the 17th day of August, 1937, an execution on said judgment was issued and placed in the hands of the Sheriff of Deer Lodge County, State of Montana, the place of residence and principal place of business of the aforesaid co-partners, requiring the Sheriff to satisfy aforesaid judgment out of the property of said co-partners and that said execution was returned to the District Court of Cascade County, on or about the [164] 10th day of September, 1937, unsatisfied and bearing the certificate of the Sheriff

that he returned said execution wholly unsatisfied because no personal or real property of said co-partners could be found.

VIII.

The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.

IX.

The defendant, United States Fidelity and Guaranty Company, retained attorneys and paid in part the said attorneys for their services in conducting the defense by the co-partners of the action instituted in the District Court aforesaid, under a "non-waiver" agreement in writing and which is in evidence in this action.

X.

On or about May 13th, 1938, the said plaintiff demanded payment of the aforesaid judgment from the defendant, a true and correct copy of which written demand so made upon the said defendant is annexed to plaintiff's complaint on file in this action marked "Exhibit A".

XI.

That neither the insurance policy heretofore referred to nor a copy thereof was ever submitted or exhibited to the State of [165] Montana or the Highway Commission of Montana, and no information concerning its provisions was ever given to said State of Montana or said Highway Commission of said State except the notice referred to in above finding of fact IV.

Upon the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW:

I.

That the plaintiff Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, is entitled to the judgment of the above entitled Court in the above entitled action in her favor and against the defendant United States Fidelity and Guaranty Company in the sum of Five Thousand One Hundred Sixteen Dollars and Eighty-nine Cents (\$5,116.89), together with interest on said sum from May 4, 1936 until paid at the

rate of six per centum (6%) per annum, and plaintiff's costs incurred in said action.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Sept. 6, 1940. [166]

Thereafter, on September 13, 1940, a Judgment was filed and entered in each of the causes herein, said Judgments being in the words and figures following, to wit: [167]

In the District Court of the United States for the
District of Montana

(Great Falls Division)

No. 69

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Defendant.

JUDGMENT

Be it remembered, that the above entitled cause came on regularly for trial on the 26th day of December, 1939, before the Court sitting without a

jury, the plaintiff appearing in person and by her counsel of record, E. J. McCabe, and the defendant appearing by its counsel of record, Messrs. Toole and Boone, and evidence having been offered and admitted on the part of the plaintiff and defendant and the cause being duly submitted to the Court for decision; and the Court having heretofore duly made, adopted and filed Findings of Fact and Conclusions of Law herein, and the Court being now fully advised and the law and the facts having been considered:

Wherefore, by reason of the law and the premises it is ordered, adjudged and decreed that the plaintiff Ethel M. Doheny, as administratrix of the estate of Roberta Doheny, deceased, do have and recover from the defendant, United States Fidelity and Guaranty Company, a corporation, the sum of Six Thousand Four Hundred Fifty Dollars and Five Cents (\$6,450.05) and interest on said sum from date hereof until paid at the rate of six percent (6%) per annum, together with plaintiff's costs herein taxed and allowed in the further sum of \$39.30.

Done this 13th day of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Sept. 13, 1940.

[168]

In the District Court of the United States for the
District of Montana

(Great Falls Division)

No. 70

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,

Plaintiff,

vs.

UNITED STATES FIDELITY and GUAR-
ANTY COMPANY, a Corporation,

Defendant.

JUDGMENT

Be it remembered, that the above entitled cause came on regularly for trial on the 26th day of December, 1939, before the Court sitting without a jury, the plaintiff appearing in person and by her counsel of record, E. J. McCabe, and the defendant appearing by its counsel of record, Messrs. Toole and Boone, and evidence having been offered and admitted on the part of the plaintiff and defendant and the cause being duly submitted to the Court for decision; and the Court having heretofore duly made, adopted and filed Findings of Fact and Conclusions of Law herein, and the Court being now fully advised and the law and the facts having been considered:

Wherefore, by reason of the law and the premises it is ordered, adjudged and decreed that the plaintiff Ethel M. Doheny, as administratrix of the estate

of Marguerite Doheny, deceased, do have and recover from the defendant, United States Fidelity and Guaranty Company, a corporation, the sum of Six Thousand Four Hundred Fifty Dollars and Five Cents (\$6,450.05) and interest on said sum from date hereof until paid at the rate of six percent (6%) per annum, together with plaintiff's costs herein taxed and allowed in the further sum of \$28.50.

Done this 13th day of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Sept. 13, 1940.

[169]

Thereafter, on September 14, 1940, a Notice of Entry of Judgment was filed in each of the causes herein, and are in the words and figures following, to wit: [170]

[Title of District Court and Cause—No. 69.]

NOTICE OF ENTRY OF JUDGMENT

To the above named Defendant and to Messrs. Toole and Boone, its attorneys of record.

You will please take notice that in the above entitled cause judgment was duly given, made and entered on the 13th day of September, 1940, by the above Court in favor of the plaintiff and against the defendant wherein and whereby it was duly ad-

judged that said plaintiff do have and recover against the defendant the sum of \$6,450.05, with interest thereon at the rate of six percent (6%) per annum until paid, and costs of plaintiff in said action.

Dated September 13, 1940.

E. J. McCABE,
Attorney for Plaintiff.

Served by mail on Sept. 13, 1940.

[Endorsed]: Filed Sept. 14, 1940. [171]

[Title of District Court and Cause—No. 70.]

NOTICE OF ENTRY OF JUDGMENT

To the above named Defendant and to Messrs. Toole and Boone, its attorneys of record:

You will please take notice that in the above entitled cause judgment was duly given, made and entered on the 13th day of September, 1940, by the above Court in favor of the plaintiff and against the defendant wherein and whereby it was duly adjudged that said plaintiff do have and recover against the defendant the sum of \$6,450.05, with interest thereon at the rate of six percent (6%) per annum until paid, and costs of plaintiff in said action.

Dated September 13, 1940.

E. J. McCABE,
Attorney for Plaintiff.

Served by mail on Sept. 13, 1940.

[Endorsed]: Filed Sept. 14, 1940. [172]

Thereafter, on September 17, 1940, a Notice of Appeal was filed in each of the causes herein, and are in the words and figures following, to wit: [173]

[Title of District Court and Cause—No. 69.]

NOTICE OF APPEAL

To Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, plaintiff herein, and to E. J. McCabe, Attorney for Plaintiff:

You and each of you will please hereby take notice that the United States Fidelity and Guaranty Company, a corporation, the defendant in the above entitled action, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment made, entered and filed in the above entitled action on the 13th day of September, 1940, wherein the plaintiff, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, was given judgment against the defendant, United States Fidelity and Guaranty Company, a corporation, in the sum of Six Thousand Four Hundred Fifty and 05/100 Dollars (\$6450.05) with interest thereon at the rate of six per cent (6%) per annum from September 13, 1940, together with plaintiff's costs of action taxed in the sum of Thirty-nine and 30/100 Dollars (\$39.30). [174]

You will further please take notice that this appeal is taken from said judgment and from the whole thereof.

Dated this 17th day of September, 1940.

HOWARD TOOLE,

W. T. BOONE,

Attorneys for Appellant,
United States Fidelity and
Guaranty Company, a cor-
poration.

[Endorsed]: Filed Sept. 17, 1940. [175]

[Title of District Court and Cause—No. 70.]

NOTICE OF APPEAL

To Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, plaintiff herein, and to E. J. McCabe, Attorney for Plaintiff:

You and each of you will please hereby take notice that the United States Fidelity and Guaranty Company, a corporation, the defendant in the above entitled action, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment made, entered and filed in the above entitled action on the 13th day of September, 1940, wherein the plaintiff, Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, was given judgment against the defendant, United States Fidelity and Guaranty Company, a corporation, in the sum of Six Thousand Four Hundred fifty and 05/100 Dollars (\$6450.05) with

interest thereon at the rate of six per cent (6%) per annum from September 13, 1940, together with plaintiff's costs of action taxed in the sum of Twenty-eight and 50/100 Dollars (\$28.50). [176]

You will further please take notice that this appeal is taken from said judgment and from the whole thereof.

Dated this 17th day of September, 1940.

HOWARD TOOLE,

W. T. BOONE,

Attorneys for Appellant,
United States Fidelity and
Guaranty Company, a cor-
poration.

[Endorsed]: Filed Sept. 17, 1940. [177]

Thereafter, on September 17, 1940, a copy of each notice of appeal, filed in each cause herein, was mailed to counsel for Plaintiff in each case, the docket record of the Clerk being as follows, to wit:

Sept. 17, 1940. Mailed copy notice of appeal to counsel for Plaintiff. [178]

Thereafter, on September 17, 1940, a Bond, (Supersedeas), was filed in each of the causes herein, said bonds being in the words and figures following, to wit: [179]

[Title of District Court and Cause—No. 69.]

BOND

Know all men by these presents, that we, the undersigned, United States Fidelity and Guaranty Company, a corporation, as principal, and Maryland Casualty Company, a corporation, duly qualified and authorized to execute bonds and undertakings and to act as surety within the State and District of Montana, as surety, are held and firmly bound unto Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, the plaintiff above named, in the full sum of Seven Thousand Dollars (\$7000.00), to be paid to the said plaintiff, her successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. [180]

Sealed with our seals and dated this 16th day of September, 1940.

The condition of this obligation is such that whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said Court, wherein Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, is plaintiff and United States Fidelity and Guaranty Company, a corporation, is defendant, a judgment was rendered against the defendant, United States Fidelity and Guaranty Company, a corporation, in the amount of Six Thousand Four Hundred fifty and 05/100 Dollars

(\$6450.05) which judgment was made and entered on the 13th day of September, 1940, and

Whereas, the defendant, United States Fidelity and Guaranty Company, a corporation, has filed in said action its notice of appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said defendant proposes to prosecute said appeal to reverse said judgment and desires that execution thereon be stayed pending determination of said appeal;

Now, therefore, in consideration of said appeal and the said supersedeas, if the above named United States Fidelity and Guaranty Company, a corporation, as such defendant shall prosecute its appeal to effect or [181] shall pay said judgment and answer all damages, interest and costs, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
a corporation,

(Seal) By DON W. JACOBUS,
Attorney-in-Fact,
Principal.

MARYLAND CASUALTY
COMPANY, a corporation,

(Seal) By JOHN W. SCHROEDER,
Its Attorney-in-Fact, thereunto
duly authorized,

Surety.

JOHN W. SCHROEDER,
Montana Resident Agent.

The within bond is hereby approved this 17th day of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Sept. 17, 1940. [182]

[Title of District Court and Cause—No. 70.]

BOND

Know all men by these presents, that we, the undersigned, United States Fidelity and Guaranty Company, a corporation, as principal, and Maryland Casualty Company, a corporation, duly qualified and authorized to execute bonds and undertakings and to act as surety within the State and District of Montana, as surety, are held and firmly bound unto Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, the plaintiff above named, in the full sum of Seven Thousand Dollars (\$7000.00), to be paid to the said plaintiff, her successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. [183]

Sealed with our seals and dated this 16th day of September, 1940.

The condition of this obligation is such that whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said Court, wherein Ethel M. Doheny, as Administratrix of the Estate of Mar-

guerite Doheny, Deceased, is plaintiff and United States Fidelity and Guaranty Company, a corporation, is defendant, a judgment was rendered against the defendant, United States Fidelity and Guaranty Company, a corporation, in the amount of Six Thousand Four Hundred fifty and 05/100 Dollars (\$6450.05) which judgment was made and entered on the 13th day of September, 1940, and

Whereas, the defendant, United States Fidelity and Guaranty Company, a corporation, has filed in said action its notice of appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said defendant proposes to prosecute said appeal to reverse said judgment and desires that execution thereon be stayed pending determination of said appeal;

Now, therefore, in consideration of said appeal and the said supersedeas, if the above named United States Fidelity and Guaranty Company, a corporation, as such defendant shall prosecute its appeal to effect or [184] shall pay said judgment and answer all damages, interest and costs, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
a corporation,

(Seal) By DON W. JACOBUS

Attorney-in-Fact,
Principal.

MARYLAND CASUALTY
COMPANY, a corporation,

(Seal) By JOHN W. SCHROEDER
Its Attorney-in-Fact,
thereunto duly authorized
Surety.

JOHN W. SCHROEDER,
Montana Resident Agent.

The within bond is hereby approved this 17th day
of September, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed September 17, 1940. [185]

Thereafter, on September 17, 1940, a copy of
Bond on Appeal, (Supersedeas), in each case, was
mailed to counsel for plaintiff, in each case, the
Clerk's docket record of said mailing being as fol-
lows, to wit:

Sept. 17, 1940, mailed copy of Bond on Appeal
(Supersedeas), to counsel for plaintiff. [186]

Thereafter, on October 10, 1940, a Designation of Contents of Record on Appeal was duly filed herein, being in the words and figures following, to wit:

[187]

[Title of District Court and Causes.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL OF DEFENDANT UNITED
STATES FIDELITY AND GUARANTY
COMPANY

Whereas, the above entitled causes were consolidated for trial and were, on the 26th day of December, 1939, tried as consolidated cases, and

Whereas, United States Fidelity and Guaranty Company, the defendant in each of the above entitled actions, has filed a Notice of Appeal, in each of the above cases, to the Circuit [188] Court of Appeals of the Ninth Circuit from a judgment, rendered in each of the above entitled actions on the 13th day of September, 1940,

Now, therefore, the said appellant in each of the above entitled causes, does hereby designate the following portions of the record, proceedings and evidence to be contained in the consolidated record of the above entitled causes on appeal:

In Cause No. 69, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Plaintiff, vs. United States Fidelity and Guaranty Company, a corporation, Defendant.

1. Plaintiff's complaint, including the verification, and Exhibit "A" thereunto attached.

2. Certified copy of the record in this action on removal from the state court to the Federal Court embracing:

(a) The plaintiff's complaint (copy to be here omitted as the same is heretofore set out in full).

(b) Summons, together with the return showing service.

(c) Verified petition for removal.

(c) Notice of petition and bond for removal.

(e) Bond for costs on removal.

(f) Order of removal.

(g) Clerk's certificate to transcript of record on removal.

3. Defendant's motion to dismiss (omitting title of court and cause). [189]

4. Defendant's motion to strike (omitting title of court and cause).

5. Order of the Court denying defendant's motion to strike and defendant's motion to dismiss.

6. Defendant's answer (omitting title of court and cause).

7. The transcript of the proceedings at the trial of said cause including the following exhibits: The material portions of exhibit 1 on deposition; all of exhibits 2, 3 and 4 on deposition; all of exhibits 9, 21, 27 and 28; and the material portions of exhibit 26; all as contained in said transcript.

8. Written opinion of the court (omitting title of court and cause).

9. Court's findings of fact and conclusions of law (omitting title of court and cause).

10. Judgment.

11. Notice of entry of judgment (omitting title of court and cause).

12. Notice of appeal with date of filing (omitting title of court and cause).

13. Supersedeas bond on appeal (omitting title of court and cause but including Court's approval of the bond).

14. Entry in civil docket as to names of parties to whom Clerk mailed copies of notice of appeal and supersedeas bond, with date of mailing.

15. Designation of contents of record on appeal.

16. Statement of points on which appellant intends to rely on the appeal (omitting title of district court and cause). [190]

In Cause No. 70, Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Plaintiff, vs. United States Fidelity and Guaranty Company, a corporation, Defendant.

1. Plaintiff's complaint, including the verification, and Exhibit "A" thereunto attached.

2. Certified copy of the record in this action on removal from the state court to the Federal Court embracing:

(a) The plaintiff's complaint (copy to be here omitted as the same is heretofore set out in full).

(b) Summons, together with the return showing service.

(c) Verified petition for removal.

(d) Notice of petition and bond for removal.

(e) Bond for costs on removal.

(f) Order of removal.

(g) Clerk's certificate to transcript of record on removal.

3. Defendant's motion to dismiss (omitting title of court and cause).

4. Defendant's motion to strike (omitting title of court and cause).

5. Order of the Court denying defendant's motion to strike and defendant's motion to dismiss.

6. Defendant's answer (omitting title of court and cause).

7. The transcript of the proceedings at the trial of said cause including the following exhibits: The material portions of exhibit 1 on deposition; all of exhibits 2, 3 and [191] 4 on deposition; all of exhibits 9, 21, 27 and 28; and the material portions of exhibit 26; all as contained in said transcript (copy to be here omitted as the same is heretofore set out in full).

8. Written opinion of the court (copy to be here omitted as the same is heretofore set out in full.)

9. Court's findings of fact and conclusions of law (omitting title of court and cause).

10. Judgment.

11. Notice of entry of judgment (omitting title of court and cause).

12. Notice of appeal with date of filing (omitting title of court and cause).

13. Supersedeas bond on appeal (omitting title of court and cause but including Court's approval of the bond).

14. Entry in civil docket as to names of parties to whom Clerk mailed copies of notice of appeal and supersedeas bond, with date of mailing.

15. Designation of contents of record on appeal (copy to be here omitted as the same is heretofore set out in full).

16. Statement of points on which appellant intends to rely on the appeal (copy to be here omitted as the same is heretofore set out in full).

Dated this 10th day of October, 1940.

HOWARD TOOLE,

W. T. BOONE,

Attorneys for defendant in
each of the above entitled
causes. [192]

Service acknowledged at Great Falls, Montana,
October 10th, 1940.

E. J. McCABE,

Attorney for plaintiff in
- each of the above entitled
causes.

[Endorsed]: Filed Oct. 10, 1940. [193]

Thereafter, on October 10, 1940, a Statement of Points was duly filed herein, being in the words and figures following, to wit: [194]

[Title of District Court and Causes.]

STATEMENT OF POINTS

Now comes the United States Fidelity and Guaranty Company, appellant in the above entitled actions, heretofore consolidated for trial, and having designated less than the complete record for inclusion in the record on appeal, herewith designates and states the points on which it intends to rely on the appeal in the consolidated actions as follows:

[195]

I.

In the appeal in these actions the appellant, United States Fidelity and Guaranty Company, will rely upon the point that Contractors' Public Liability Policy issued by it as insurer to Coverdale & Johnson as insured (defendant's exhibit 27, pages 54 to 79, inclusive, of the typewritten transcript) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that the court was in error:

(a) In denying defendant's motion to dismiss the complaint which motion was made upon the ground that the said complaint fails to state a claim upon which relief can be granted.

(b) In denying defendant's motion to strike that part of paragraph III of plaintiff's complaint from and including the word "that" on line 14 to and including the word "thereof" on line 25, all on page 2, said motion to strike being based upon the ground that the said portion of paragraph III above referred to was and is redundant, immaterial, impertinent and surplusage.

(c) In admitting plaintiff's exhibit 1 on deposition (the pertinent portions of said exhibit 1 appearing in the typewritten transcript, pages 14 to 28) said exhibit 1 being the contract between the State of Montana and Coverdale & Johnson for the [196] construction of certain highway bridges on Federal Aid Project No. NRH-176 "E", Unit 2, in Lewis and Clark County, Montana.

(d) In admitting plaintiff's exhibit 2 on deposition (typewritten transcript, pages 28 to 32) said exhibit 2 being the contract bond furnished by United States Fidelity and Guaranty Company to Coverdale & Johnson to guarantee the faithful performance and completion of the contract for the construction of said bridges.

(e) The court was in error in admitting plaintiff's exhibit 3 on deposition (typewritten transcript, pages 36 and 37) which exhibit 3 is a letter from the State Highway Commission of the State of Montana to Coverdale & Johnson wherein reference is made to the bridge contract

(plaintiff's exhibit 1 on deposition) and the performance bond (plaintiff's exhibit 2 on deposition) and also referring to the Contractors' Public Liability Policy (defendant's exhibit 27).

(f) In admitting plaintiff's exhibit 4 on deposition (typewritten transcript, page 39) which exhibit 4 on deposition is a letter from United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana referring [197] to said Contractors' Public Liability Policy (defendant's exhibit 27).

(g) The court was in error in its Findings of Fact Nos. III, IV and VIII in each of said causes in resorting to the contract (plaintiff's exhibit 1 on deposition) and the bond (plaintiff's exhibit 2 on deposition) and the letter from the Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition) and the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and in resorting to the evidence of the witness W. O. Whipps (typewritten transcript, pages 12 to 41, inclusive) for the purpose of construing the Contractors' Public Liability Policy (defendant's exhibit 27) in that there was no ambiguity or uncertainty in respect to said policy justifying a resort to extrinsic evidence.

(h) The court was in error in Finding of

Fact No. VIII in each of said causes wherein the court found as follows:

“The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was [198] introduced in evidence by the defendant corporation and received in evidence as defendant’s Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Montana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.”

II.

The appellant will raise the point on appeal that the Contractors’ Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson did not cover any risk or risks excepting such as should arise by reason of and during the progress of the work described in said policy and covered thereby and that therefore there was no sufficient or competent evidence in the record to justify the court

in making that portion of its Finding of Fact No. V in each of said causes of action reading as follows:

“That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under the aforesaid agreement * * *” [199]

III.

The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson excluded risks arising out of the operation of the automobile in these cases and that there was no sufficient evidence in the record to justify the court in making its Finding of Fact No. V in each of said causes of action reading as follows:

“That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of

Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny (Marguerite Doheny) and her resulting death as the proximate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of \$5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant." [200]

IV.

The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the United States Fidelity and Guaranty Company to Coverdale & Johnson (defendant's exhibit No. 27) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that by reason of the failure of the plaintiff in the court below to request or plead a reformation of said policy and notwithstanding the fact that no issue of reformation thereof was made or raised at any time in the pleadings or in the trial of said actions the court was in error:

(a) In that in Finding of Fact No. VIII in each of said causes of action the court disregarded the exclusions in the policy and in effect reformed the same as follows:

“The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.”

(b) In that it appears from the written opinion of the trial court that the provisions of the Contractors' Public Liability Policy were construed together with the contract (plaintiff's exhibit 1 on deposition), the bond (plaintiff's

exhibit 2 on deposition), the letter from the [201] Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition), the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and with the evidence of W. O. Whipps, all of which is summed up in the statement of the court on the last page of the typewritten opinion in the following language:

“Under the construction given the policy, reading it as one with the agreement and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in any event.”

V.

By filing this statement of points the appellant in each of said causes does not intend to waive the right to urge error upon any of the rulings or findings of the trial court resulting in a judgment in each of said causes in favor of the plaintiff and against the defendant.

Dated this 10th day of October, 1940.

HOWARD TOOLE

W. T. BOONE

Attorneys for defendant in
each of the above entitled
causes. [202]

Service acknowledged at Great Falls, Montana,
October 10th, 1940.

E. J. McCABE

Attorney for plaintiff in each
of the above entitled causes.

[Endorsed]: Filed Oct. 10, 1940. [203]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
District of Montana—ss:

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 204 pages, numbered consecutively from 1 to 204 inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 69, Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, vs. United States Fidelity and Guaranty Company, a corporation, and in case No. 70, Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, vs. United States Fidelity and Guaranty Company, a corporation, designated by the parties as the record on appeal therein, except the Summons called for in said designation, there being no Summons or certified copy thereof on file in this court, as ap-

pears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Forty-one and 10/100ths Dollars (\$41.10) and have been paid by the appellants.

Witness my hand and the seal of said court at Great Falls, Montana, this 23rd day of October, A. D. 1940.

(Seal)

C. R. GARLOW,
Clerk U. S. District Court,
District of Montana.

By C. G. KEGEL
Deputy Clerk. [204]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL
EXHIBITS.

Upon application of counsel for United States Fidelity and Guaranty Company, a corporation, the defendant in each of the above entitled actions,

It Is Hereby Ordered, That in connection with the appeal of the said defendant, United States Fidelity and Guaranty Company, a corporation, in each of the above entitled actions to the United States Circuit Court of Appeals for the Ninth Circuit, the following original exhibits introduced in evidence at the trial of said causes as consolidated

by the court, may be transmitted to the Appellate Court for its inspection:

Plaintiff's Exhibits 1, 2, 3, and 4, all on deposition,

Plaintiff's exhibit No. 26, and

Defendant's exhibits Nos. 27 and 28.

Dated, this 26th day of October, 1940.

CHARLES N. PRAY

Judge of the United States
District Court, District of
Montana.

[Endorsed]: Filed and entered October 26, 1940.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court in and for the.....District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original Order of Transmission of Original Exhibits, filed and entered in Civil Actions Numbers 69 and 70, entitled: Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, deceased, vs. United States Fidelity and Guaranty Company, a corporation; and Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, vs. United States Fidelity and Guaranty Company, a corporation, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Great Falls this 26th day of October, A. D. 1940.

(Seal)

C. R. GARLOW,
Clerk.

By C. G. KEGEL
Deputy Clerk.

[Endorsed]: No. 9668. United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Appellee. and United States Fidelity and Guaranty Company, a Corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed October 26, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9668

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,

Appellee,

and

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,

Appellee.

To the Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit:

I.

DESIGNATION OF PARTS OF THE RECORD
TO BE PRINTED

You will please be advised that the appellant,
United States Fidelity and Guaranty Company, a
corporation, in each of the above causes, does hereby
designate for printing in the consolidated appeal of

the above cases the entire transcript of the record forwarded to you by the Clerk of the United States Court for the District of Montana in the above entitled actions and that the said appellant, in the consolidated appeal of the above entitled causes, will rely upon the entire record in this appeal.

You will please further be advised that said appellant has taken a separate appeal in each of the above causes but that the same record, being a consolidated record, will serve in each of said appeals.

II.

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY ON APPEAL.

Whereas, United States Fidelity and Guaranty Company, a corporation, has filed separate notices of appeal and is taking separate appeals to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in each of the above entitled actions in the District Court of the United States for the District of Montana, on the 13th day of September, 1940, and

Whereas, a consolidated record on appeal, in the above entitled causes, has been filed in said Circuit Court of Appeals,

Now, Therefore, the said appellant does hereby make and file this statement of the points on which it intends to rely on appeal of the above entitled actions, such statement being filed for both of the above entitled causes by reason of the fact that the

same points will be raised by the said appellant in each of the above entitled causes.

1. In the appeal in these actions the appellant, United States Fidelity and Guaranty Company, will rely upon the point that Contractors' Public Liability Policy issued by it as insurer to Coverdale & Johnson as insured (defendant's exhibit 27, pages 54 to 79, inclusive, of the typewritten transcript) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that the court was in error:

(a) In denying defendant's motion to dismiss the complaint which motion was made upon the ground that the said complaint fails to state a claim upon which relief can be granted.

(b) In denying defendant's motion to strike that part of paragraph III of plaintiff's complaint from and including the word "that" on line 14 to and including the word "thereof" on line 25, all on page 2, said motion to strike being based upon the ground that the said portion of paragraph III above referred to was and is redundant, immaterial, impertinent and surplusage.

(c) In admitting plaintiff's exhibit 1 on deposition (the pertinent portions of said exhibit appearing in the typewritten transcript, pages 14 to 28) said exhibit 1 being the contract

between the State of Montana and Coverdale & Johnson for the construction of certain highway bridges on Federal Aid Project No. NRH-176 "E", Unit 2, in Lewis and Clark County, Montana.

(d) In admitting plaintiff's exhibit 2 on deposition (typewritten transcript, pages 28 to 32) said exhibit 2 being the contract bond furnished by United States Fidelity and Guaranty Company to Coverdale & Johnson to guarantee the faithful performance and completion of the contract for the construction of said bridges.

(e) The court was in error in admitting plaintiff's exhibit 3 on deposition (typewritten transcript, pages 36 and 37) which exhibit 3 is a letter from the State Highway Commission of the State of Montana to Coverdale & Johnson wherein reference is made to the bridge contract (plaintiff's exhibit 1 on deposition) and the performance bond (plaintiff's exhibit 2 on deposition) and also referring to the Contractors' Public Liability Policy (defendant's exhibit 27).

(f) In admitting plaintiff's exhibit 4 on deposition (typewritten transcript, page 39) which exhibit 4 on deposition is a letter from United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana referring to said Contractors' Public Liability Policy (defendant's exhibit 27).

(g) The court was in error in its Findings

of Fact Nos. III, IV and VIII in each of said causes in resorting to the contract (plaintiff's exhibit 1 on deposition) and the bond (plaintiff's exhibit 2 on deposition) and the letter from the Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition) and the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and in resorting to the evidence of the witness W. O. Whipps (typewritten transcript, pages 12 to 41, inclusive) for the purpose of construing the Contractors' Public Liability Policy (defendant's exhibit 27) in that there was no ambiguity or uncertainty in respect to said policy justifying a resort to extrinsic evidence.

(h) The court was in error in Finding of Fact No. VIII in each of said causes wherein the court found as follows:

“The defendant United States Fidelity and Guaranty Company executed and delivered to the said co-partners a written public liability insurance policy bearing date October 1, 1934, and which was introduced in evidence by the defendant corporation and received in evidence as defendant's Exhibit 27 and which policy was written and issued by defendant as a purported compliance with the requirements of the written agreement with the State Highway Commission of Mon-

tana. The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.”

2. The appellant will raise the point on appeal that the Contractors’ Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson did not cover any risk or risks excepting such as should arise by reason of and during the progress of the work described in said policy and covered thereby and that therefore there was no sufficient or competent evidence in the record to justify the court in making that portion of its Finding of Fact No. V in each of said causes of action reading as follows:

“That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being

used in carrying on the work under the aforesaid agreement”

3. The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the defendant, United States Fidelity and Guaranty Company, to Coverdale & Johnson excluded risks arising out of the operation of the automobile in these cases and that there was no sufficient evidence in the record to justify the court in making its Findings of Fact No. V in each of said causes of action reading as follows:

“That on the 12th day of December, 1934, and while carrying on the work mentioned and described in the aforesaid written agreement between the said co-partners and the State of Montana the aforesaid co-partners operated a certain automobile in such a grossly negligent and reckless manner as to injure and kill one Roberta Doheny (Marguerite Doheny) and that at the time the said Roberta Doheny (Marguerite Doheny) was a member of the public and said automobile was then and there being used in carrying on the work under aforesaid agreement and that thereafter in an action instituted in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade by the above named plaintiff and against the aforesaid co-partners to recover for the injuries and damages sustained by said Roberta Doheny (Marguerite Doheny) and her resulting death as the proxi-

mate result of the reckless and grossly negligent operation of said automobile as aforesaid, a judgment in the sum of \$5,116.89 was duly given, made and entered by said Court in favor of the said plaintiff and against the said co-partners on the 4th day of May, 1936, and that neither said judgment nor any part thereof has been paid by said co-partners or by the defendant, United States Fidelity and Guaranty Company, although demand of payment thereof has heretofore and prior to commencement of the above entitled action been made by plaintiff, upon said co-partners and said defendant."

4. The appellant will raise the point on appeal that the Contractors' Public Liability Policy issued by the United States Fidelity and Guaranty Company to Coverdale & Johnson (defendant's exhibit No. 27) was a clear and unambiguous contract of insurance which should have been construed by the court without recourse to extrinsic evidence and that by reason of the failure of the plaintiff in the court below to request or plead a reformation of said policy and notwithstanding the fact that no issue of reformation thereof was made or raised at any time in the pleadings or in the trial of said actions the court was in error:

(a) In that in Finding of Fact No. VIII in each of said causes of action the court disregarded the exclusions in the policy and in effect reformed the same as follows:

“The policy of insurance so written and delivered contains exclusion provisions which are antagonistic and contrary to the requirements of the aforesaid agreement with the State Highway Commission of the State of Montana, and such exclusion provisions were and are inoperative to defeat recovery in this action.”

(b) In that it appears from the written opinion of the trial court that the provisions of the Contractors' Public Liability Policy were construed together with the contract (plaintiff's exhibit 1 on deposition), the bond (plaintiff's exhibit 2 on deposition), the letter from the Montana Highway Commission to Coverdale & Johnson (plaintiff's exhibit 3 on deposition), the letter from the United States Fidelity and Guaranty Company to the State Highway Commission of the State of Montana (plaintiff's exhibit 4 on deposition) and with the evidence of W. O. Whipps, all of which is summed up in the statement of the court on the last page of the typewritten opinion in the following language:

“Under the construction given the policy, reading it as one with the agreement and bond, together with the evidence, reformation seems unnecessary, since it would mean the same in any event.”

5. By filing this statement of points the appellant in each of said causes does not intend to waive

the right to urge error upon any of the rulings or findings of the trial court resulting in a judgment in each of said causes in favor of the plaintiff and against the defendant.

Dated this 19th day of October, 1940.

HOWARD TOOLE

W. T. BOONE

Attorneys for the Appellant,
United States Fidelity and
Guaranty Company, a corpo-
ration, in each of the above
entitled causes.

[Endorsed]: Filed Oct. 26, 1940. Paul P. O'Brien,
Clerk.

